

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 610.

JOHN HILL, JR., REUBEN G. CHANDLER, ADOLPH
KEMPNER, ET AL., APPELLANTS,

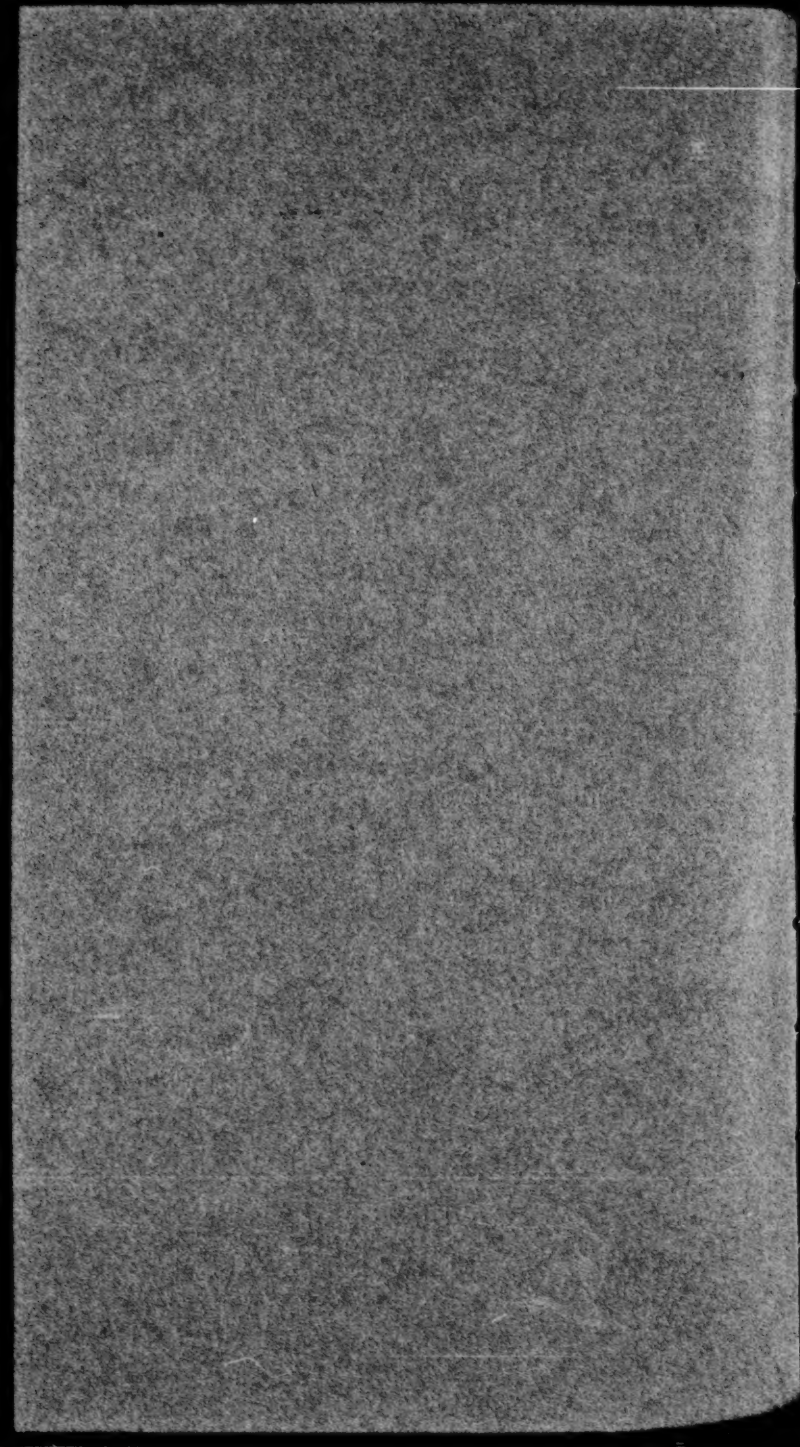
vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE;
DAVID H. BLAIR, COMMISSIONER OF INTERNAL
REVENUE OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 19, 1921.

(23,571)



(28,571)

SUPREME COURT OF THE UNITED STATES.

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No. 616.

JOHN HILL, JR., REUBEN G. CHANDLER, ADOLPH
KEMPNER, ET AL., APPELLANTS,

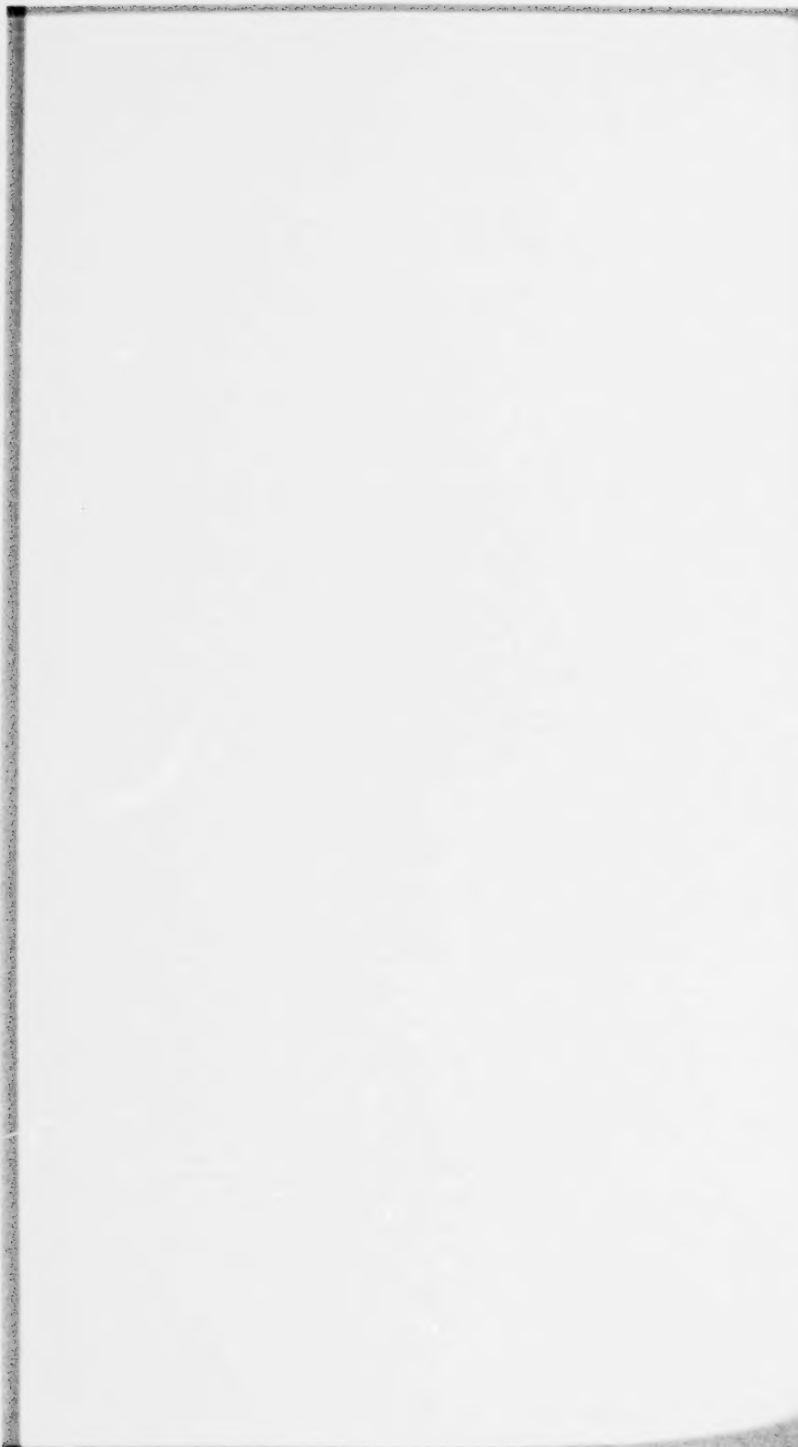
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I Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, Begun and Held at the United States Court Room, in the City of Chicago, in said District and Division, Before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Monday, the Seventh Day of November, in the Year of Our Lord One Thousand Nine Hundred and 21, Being One of the Days of the Regular November Term of Said Court, Begun Monday, the Seventh Day of November, and of Our Independence the 146th Year.

Present:

Honorable Kenesaw M. Landis, District Judge.
John J. Bradley, U. S. Marshal.
John H. R. Jamar, Clerk.

II In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Plaintiffs,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Be it remembered that heretofore, to-wit: on the 25th day of October, 1921, came the above named complainants, by their solicitors, and filed their bill of complaint, as follows:

I Filed Oct. 25, 1921. John H. R. Jamar, Clerk.

In the District Court of the United States, Northern District of Illinois, Eastern Division,

2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Bill Attacking the Constitutionality of the Future Trading Act.

Robbins, Townley & Wild,
Solicitors for Complainants.
Henry S. Robbins,
Counsel.

1a In the District Court of the United States, Northern District of Illinois, Eastern Division.

2400.

JOHN HILL, JR., et al., Complainants,

VS.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Bill Attacking the Constitutionality of the Future Trading Act.

To the Honorable the Judges of said Court, in Chancery Sitting:

Your orators, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, bring this, their bill of complaint in their own behalf (and in behalf of all other members of the Board of Trade of the City of Chicago, who may wish to join therein or share in the relief granted herein), against Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois;

2 Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade, and allege:

1. That the Board of Trade of the City of Chicago (hereinafter called the Board) is a corporation organized under a special charter granted by the State of Illinois, February 18, 1859, by which certain persons before that date residing in the City of Chicago and engaged there in the purchase and sale of grain were created a corporation, and were given power to admit such persons as members and expel such members as said corporation might see fit, and also power to adopt and maintain such rules, regulations and by-laws as said corporation might think proper for the government of said corporation and for the management of the business of its members and the mode in which it should be transacted; and said corporation was also authorized to appoint committees of arbitration for the settlement of such matters of difference as might be submitted by members of said Board or others; and said charter also provided that any award in such arbitration, when filed in any Circuit Court of said state, should have the force and effect of a judgment, upon which

an execution might issue as upon other judgments; and by said charter said corporation was also given power to appoint such persons as they may see fit to examine, measure, weigh, gauge, or inspect flour, grain and other articles of produce or traffic commonly dealt in by the members of said corporation, and the certificate of such appointee as to quality or quantity of any such article, or its brand or mark was made evidence between any buyer and seller assenting to the employment of such appointee; and said corporation was also given power to do or carry on any business that is usual in the management of boards of trade or chambers of commerce, a copy of which charter is hereto attached and made a part hereof as Exhibit "A."

2. That upon the granting of said charter said grantees of said charter adopted and declared the objects of said Board to be:

"To maintain a Commercial Exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

and to accomplish these objects the members of said Board adopted, and for many years maintained, and now have, certain regulations governing the inspection of flour, grain provisions, hay, the cutting and packing of hog products, the grading and inspection of flaxseed, the regulation of grain warehouses, whose receipts shall be made regular for delivery on grain contracts, the sampling of grain, the storage of provisions, the management of a clearing house maintained by said Board for the convenience of its members, the weighing of grain, the maintenance of a Custodian Department respecting commodities dealt in, the distribution of market records and reports, and other like matters. And the Board has also, for many years adopted and maintained, and now maintains, a set of rules which provide for the admission and expulsion of members and govern the relations of its said members to said Board and to each other, and also the manner in which the business of its members should be transacted, which rules also vest (subject to said rules) the government of said Board and the management of its business and financial concerns in a board of eighteen directors, one of whom shall be president and two of whom shall be vice-presidents of said Board, (the individuals above named being at present its officers and directors); and said rules further provide that said board of directors should annually assess against each of its members an amount, which in the aggregate should be sufficient to meet all the expenditures of said Board. And certain of its said rules which are material in this controversy are set out in Exhibit "B" attached to this bill and made a part thereof.

3. That among the rules so adopted and now in force are some providing that, whenever any member should default on a business

contract or on the payment of any award made in any arbitration, or should be guilty of certain other misconduct, he should be suspended by the board of directors from all the privileges of membership, and that in case any member shall be guilty of certain other graver offenses, such as bad faith, or an attempt at extortion or other dishonest conduct, he shall be expelled from the Board; but that before any such suspension or expulsion written charges shall be filed with the board of directors specifying the offense charged, of which the member shall have notice and a hearing before such suspension or expulsion; and that one of said rules (see Section 1, Rule X in Exhibit B) provides that any male person of good character and credit may be admitted to membership by the board of directors upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-laws of the Association, and all amendments that may be made thereto, which agreement is signed by all members and reads as follows:

"We, the undersigned members of the Board of Trade of the City of Chicago, do, by our respective signatures and by virtue of our membership in said corporation, hereby mutually agree and covenant with each other and with the said corporation, that we will, in our actions and dealings with each other and with the said corporation, be in all respects governed by and respect the rules, regulations and by-laws of the said corporation as they now exist, or as they may be hereafter modified, altered or amended."

That said Board does not admit, and never has admitted, to membership any corporation; but one of its said rules provides that, if any two members of said Board are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to any trade or contract made by it in any of the commodities bought and sold on the exchange of said Board, but that in that event said two members shall be subject to be disciplined for any default in the execution of any such trade or contract of said corporation in the same manner as they are subject to be disciplined for failure to comply with the terms of any business obligation of their own; and that said Board now has 1,610 members, and that all of your orators are members in good standing of said Board.

4. That yearly since 1859 said Board has levied an assessment upon all its members sufficient, with the moneys received from its other incidental sources of revenue, to meet all its ordinary expenses and with the surplus of its said revenue it has acquired, and now owns, in fee real estate in the business district of Chicago, upon which it has constructed a large building, which provides it with an exchange room and offices and also surplus space, from which said Board derives a substantial rental; and that the fair market value of such real estate and building, over and above a mortgage thereon, exceeds \$2,000,000,

and that said Board now raises each year by assessments upon its members as aforesaid, more than \$240,000 for the purpose of maintaining said building and its said exchange.

5. That the Board does not enter, and never has entered, into any commercial transactions of any kind whatever for profit, nor does it pay, or seek to pay, any dividends to its members; that its chief purpose and function is to provide an exchange room where its members may meet daily between certain market hours and make with each other contracts for the purchase and sale of grain and other products of the farm, and also to prescribe, and enforce, rules respecting the terms of such contracts and to enforce, by disciplinary proceedings when necessary, compliance by its members with their said contracts, and for the settlement of disputes arising between its members out of their trades, and about the only other function of said Board is to determine, who are fit persons, as respect character and financial responsibility, to be and remain its members.

That as its main source of revenue is, and always has been, the annual dues paid by its members, it is incumbent upon the said Board to make it profitable for persons to become and remain members and pay such yearly assessments; and that, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for said Board, not only to make it profitable for members to remain such, but also to give a substantial salable value to such memberships; and that said Board seeks to accomplish and accomplishes this by

- 7 (1) limiting the number of its members as aforesaid;
- (2) providing that only members may make transactions in its exchange room;
- (3) prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commission, which members, when acting as agents, must charge their principals for making transactions on said exchange;

and that for this purpose said Board has for many years maintained (as do all commercial exchanges), and still maintains and enforces, a rule prescribing the minimum rates of commission (which are reasonable) as respects each of the different kinds of transactions, each member is required to charge, whenever acting for a principal in any transaction upon its exchange, but the rate to members is lower than the rate to non-members, and that one of the essential features of this rule is the following provision:

"Rule XIV. * * * F. Any member who, or whose firm or corporation, shall be convicted by the Board of Directors of a violation of the provisions of this rule, or of any evasion thereof by making rebates in prices, by making any contract or observing any contract already made, by furnishing a membership in this Ex-

change, by giving any bonus, gift, donation, or otherwise, or shall purchase or offer to purchase any grain, seeds, provisions or other commodities consigned to him, them, or it, for sale, or by rendering any other service or concession whatsoever, with the intent to evade in any way directly or indirectly the regular rates of commission or brokerage established by this rule, shall be expelled from this Association."

That the provision for the expulsion of any member violating its said commission rule was first inserted in said rule about the year 1900 and that before such insertion the salable value of its memberships did not exceed \$800, and that since such amendment and its strict enforcement by said Board, memberships have been sold to persons desiring to become members for as much as \$11,000 and are now saleable for more than \$7,000.

6. That in recent years there have been organized in most of the grain-producing states many so-called farmers' co-operative societies, associations or corporations and farmers' co-operative elevator companies, with the avowed purpose of enabling such farmers as should become members thereof to market their crops at actual cost, and, if possible, to market their crops through the exchanges at actual cost, and without paying the commissions charged by members of such exchange, the method contemplated to attain this being to make one of the salaried officers of said co-operative organization a member of the exchange, and through him to sell all the grain produced by members of the co-operative association—he temporarily charging the prescribed commissions—and ultimately rebating back to the members of such organization the aggregate of such commissions (after paying his salary and incidental expense) on the basis of the number of bushels of grain each producer has sold through said organization—such rebates being popularly called "Patronage dividends;" and that at least one of the states (Nebraska) has passed a statute providing that cooperative organizations may be organized with the power to distribute their earnings to their members upon the basis of, or in the proportion to the quantity of grain which each member has sold through said co-operative organization; and that on April 18, 1921, there was organized under the laws of Delaware a corporation known as "U. S. Grain Growers, Inc.," membership in which is limited to producers of grain; and the promoters of said corporation publicly state the general purpose of said corporation is the creation of a non-stock, non-profit agricultural organization, which can market at cost grain produced by its members, and which extends the so-called farmers' co-operative movement farther than co-operative methods have thus far gone.

That the by-laws of such corporation provide for the organization of subsidiary corporations for the carrying out of said purposes, and that the operation of said corporation shall consist of the marketing of the grain of its members, by virtue of contracts with state-wide or interstate growers' associations, farmers' co-operative elevator companies or with local co-operative associations; and that said U. S. Grain Growers, Inc., are tendering large numbers of producers

of grain throughout the United States a contract between the individual producer and his local co-operative company, and is also seeking the execution by all local co-operative elevator companies of contracts with said U. S. Grain Growers, Inc., the purpose and object sought to be accomplished through said two contracts being that the grain of all growers of grain who sign such contracts with any local elevator company shall, through the co-operation of said local elevator company and said U. S. Grain Growers, Inc., be sold at actual cost, and without the payment of any commissions to members of any of the grain exchanges of the country; and your orators are informed and believe that very many producers and co-operative elevator companies have already signed and delivered to said U. S. Grain Growers, Inc., such contracts, copies of which two contracts are annexed to this bill and made a part thereof as Exhibit "C."

That heretofore members of said co-operative associations have sought to become members of said Board, but said Board has refused to admit any such persons to membership, for the reason that the avowed purpose of such applicants has been to rebate back to the members of their organization the aggregate amount of their commissions, less their salary and expenses, and that this would violate and break down said commission rule of said Board, and would ultimately destroy the business of its members, which consist in the receiving of grain by consignment for sale on commission, the ultimate effect of which would be to much impair, if not destroy, the value of the memberships of said Board, and make it difficult for said Board to maintain sufficient members who would be willing to pay assessments to meet the expenses of maintaining its said exchange.

7. That the members of said Board engage only in the following different kinds of trading in grain:

(1) Many of them, including some of your orators, act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them, which, as agents, they sell for immediate delivery, and they account to their principals for the proceeds of such sales less their commissions and other expenses; and many of said members, including some of your orators, acting either as agents or principals, purchase and sell grain in Chicago, which is in cars or elevators, for immediate delivery, all of such transactions being popularly known as "cash" trades.

(2) Many members of said Board, including some of your orators, send out in the afternoons, whenever the market conditions are favorable, telegrams and letters to country grain dealers and others non-resident in Chicago, offering to buy grain at a certain named price and to be shipped within a certain named time, if the offer shall be accepted by telegram received by the offering member before the opening of the Board's exchange next morning, such transaction being known to the trade as "contracts to arrive" or "cash sales

for deferred shipment"; many members, including some of your orators, also send out, when market conditions are favorable, telegrams and letters to millers and others (non-residents in Chicago) on the consumer's side of the market offering to sell grain at a named price and subject to shipment within a named time, if such offers are accepted within a certain time, transactions of this kind being also known to the trade as "cash sales for deferred shipment."

(3) Another kind of future trading engaged in by some of the members of said Board of Trade prior to October 1, 1921, was the making of trades known as "privileges," "offers," "puts and calls," "indemnities," or "ups and downs," which are unilateral contracts, in which a member of said Board pays to another member a small sum (\$500 for every five thousand bushels of grain involved) for the privilege of calling on the member receiving such consideration to deliver to the paying member at a future date a specified quantity of grain of a grade deliverable upon future contracts of said Board, or in which a member pays such consideration for the privilege of delivering to the member receiving such compensation on a specified future date a certain number of bushels of said grain, the paying member having the option to deliver or receive, but not being obliged to do so; and when the course of the market makes it profitable for him to exercise his said option he performs said contract either by making with the other member a bi-lateral contract for future delivery (such as is hereinafter described) for the quantity and at the price named in optional contract, or by the delivery or receipt of warehouse receipts of a regular warehouse of the character herein-after described.

(4) Many members of said Board, including some of your orators, daily engage either as principals or as agents, in the making upon said exchange, of contracts with other members of the Board for the purchase and sale of grain for future delivery, said contracts providing that the seller therein shall deliver in Chicago, the grain covered by the contract upon any day of the named month that he shall select. Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Board has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a "pit," where its members may conveniently, and do daily, gather and make such contracts with each other by open vive voce bidding; and respecting such trading the rules of said Board have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market upon its exchange room and only during the hours of regular trading; and said rules also provide that no trade or contract for future delivery shall be made or offered to be made by any member of said Board, except between 9:30 a. m. and 1:15 p. m., except on Saturday, when the trading must close at 12 o'clock M., it being the object and intent of said rule that all such trading which shall tend to the maintenance of a public market shall be confined

within the hours above specified; by reason whereof all such trading in grain for future delivery by members of said Board is in fact confined to said Exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Board requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Board, and that the contract shall be made with the member first accepting said offer.

8. That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Board make valid for delivery; that a rule of said Board now and for many years in force (see Rule XXI of Exhibit B), provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Board, and have been by the Board of Directors declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of the Board of Directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said Board of Directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state entitled, "An Act to regulate public warehouses and the warehousing and inspection of grain and to give effect to Article XIII of the Constitution of this state," which said Act provides that it shall be the duty of every warehouseman of Class "A" to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the same grade received about the same time as the date of said receipt; and by said Act it is further

14 provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a "separate bin," and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class "A" in a special bin, and if so stored the ware-

house receipts issued for such grain are not, and never have been, deliverable upon said contracts of future delivery made by members of said Board; nor has said Board ever declared a regular elevator under said rule any warehouse which has not been licensed under said statute to conduct a warehouse of Class "A."

9. That at the present time there are twelve warehouses, with an aggregate capacity of 12,950,000 bushels, whose proprietors have received under said statute, licenses to conduct Class "A" warehouses, and which have been declared regular by the Board under said Rule XXI, for the year ending July 1, 1922. That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago upon cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class A, it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus
15 any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

10. That in this trading for future delivery on the exchange of said Board during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the "ringing" system which is provided for by the rules of said Board; and that practically all said remaining future contracts are performed or completed during the month specified for delivery by the delivery by buyers to sellers of warehouse receipts of public warehouses of Class "A" which warehouses have been made regular under the said rules of said Board.

That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contract, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete, and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said Board of Directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload
lots actually delivered under the provisions of this rule on
16 contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even

a very small percentage of the total quantity of grain actually delivered upon said contracts; and that, while said rule also authorizes said Board of Directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Board and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said Board of Directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Board, said Board has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class "A" warehouses declared regular by said Board of Trade is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of time, and that at the present time said Board of Directors of said Board have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator.

17 11. That a large part of the total volume of trading for future delivery upon the exchange of said Board above described consists of contracts made by grain merchants, millers and others, who make such contracts only for the purpose of insuring themselves against price fluctuations respecting other grain owned by them for the purpose of merchandizing or shipping to other consuming markets or to manufacture into flour, and that in most cases such contracts for future delivery are fulfilled, not by the delivery of the grain but by the making of counter-contracts to offset against the ones originally made; that another large part of the volume of said future trading on the exchange of said Board consists of contracts made by or for so-called speculators, being persons who have capital and make a study of trade conditions affecting prices and endeavor to forecast the future prices of grain and to profit thereby through the making of said contracts for future delivery.

That there is produced yearly in the United States more wheat, corn and oats than is consumed within said United States; that from the year 1899, to the year 1913, both inclusive, the number of barrels of wheat-flour exported in any year, as disclosed by the statistics of the United States Department of Commerce, was not less than 8,826,000 barrels, and in one of said years the number of barrels exported was 19,716,000; and that during one of said years

there was exported 154,856,000 bushels of wheat, and except in one of said years (when there was a failure of the crops), there has been not one of said years in which the amount of wheat exported did not exceed 23,000,000 bushels; and that during one of said years there was exported over 209,000,000 bushels of corn, and in none of said years was there exported less than 26,000,000 bushels of corn and that yearly exports of oats during said years range from over 46,000,000 bushels to 1,000,000 bushels.

18 That in order to enable its members and their customers to have all obtainable knowledge when making their said contracts for future delivery, said Board gathers from all parts of the world such data and other information respecting the conditions of growing crops, the amounts of grain on hand in different countries, etc., as it can obtain—incurring a large expense therein—and makes such information available to all its members, and through them to their customers; and said Board also collects and sanctions the distribution of its own continuous quotations of prices made in its said “pits”.

That other commercial exchanges which furnish to their members and their customers like facilities for making contracts for future delivery, are located and maintained at Minneapolis, Duluth, Omaha, Kansas City and St. Louis; that the members of all of such exchanges are competing with the members of said Board and these other exchanges, for the business of making contracts for future delivery for customers and the purchase of cash grain at country points; and many of the members of said Board are also members of some or all of said other exchanges, and they trade in said other exchanges for future delivery when price conditions there, as compared with price conditions on said Board, make it profitable for them to do so; and that the facts above stated, as well as the present supply of available grain and the present and future requirements of the millers and consumers, not only in this country but in different countries of Europe, constitute the elements, which determine from time to time the prices, at which said future trading on said Board is transacted; and that no member of said Board has ever been indicted or convicted, under either the law of the State of Illinois or the federal statute, for running a “corner” on said Board.

19 12. That during the years from 1884 to 1913, both inclusive, wheat of the grade contemplated in the contracts for future delivery on the said Board sold as low as $48\frac{7}{8}$ cents per bushel and never more than two dollars per bushel, and during most of said time the price of said wheat was below \$1.00 per bushel; and that during the same years corn of the kind and grade deliverable upon said future contracts sold as low as $19\frac{1}{4}$ cents per bushel and never higher than one dollar per bushel, and for most of said time sold below 60 cents per bushel, and that during said years the price of oats of the quality and grade deliverable upon said future contracts sold as low as $14\frac{3}{4}$ cents per bushel and never sold higher than $62\frac{1}{2}$ cents per bushel and for much the greater part of said period sold

under 40 cents per bushel; and that at the present time contract wheat is selling for about \$1.05 per bushel, contract corn about 46 cents a bushel and contract oats at about 31 cents a bushel; and that no member of said Board can afford to make contracts for future delivery and pay the tax thereon imposed by The Future Trading Act and said law in fact prohibits all those who are not members of a board of trade, which has been designated by the Secretary of Agriculture a contract market under said Act, from making any contracts for future delivery respecting grain.

13. Your orators are advised by their counsel and charge that said Future Trading Act violates the Constitution of the United States in the following, as well as in other, respects:

(1) It seeks to deprive your orators and other members of said Board of their property without due process of law contrary to the 5th amendment of said Constitution, in that the compulsory admission to membership on said Board of representatives of co-operative associations of producers as required in clause (E) of Section 5 will impair the value of all memberships in said Board.

20 (2) It violates Section VIII of Article I, and the 10th Amendment of said Constitution, in that it attempts to regulate commerce, which is not commerce with foreign governments or among several states or with the Indian tribes, but is commerce wholly between persons contracting within the State of Illinois respecting the purchase or sale of grain which forms a part of the common property of that state—in that, in other words, it seeks to regulate commerce which is not interstate but purely intrastate in character.

(3) It violates the 10th amendment to the said Constitution in that it interferes with the right of the State of Illinois to provide for and regulate the maintenance of a grain exchange within its borders upon which is conducted the making of contracts which are merely intrastate transactions.

(4) It violates the 5th amendment to the Constitution in that it gives to farmers' co-operative associations and their representatives the right to share in and enjoy the use of real estate owned by the Board (a private corporation) and used for the exclusive use and benefit of its members, and this without giving the Board or its members any compensation therefor.

(5) It violates the 5th amendment to said Constitution, in that it attempts to take the private property of the Board and its members for public use without just compensation to such owners.

(6) It violates Section 8 of Article I, and the tenth amendment of said Constitution, in that the taxes imposed by said Act are not laid either to pay the debts, or provide for the common defense or general welfare of the United States, but for the purpose only of regulating grain exchanges as respect intrastate transactions of their

members and of benefiting a class (producers of grain) at the expense of another class (members of grain exchanges).

(7) It violates the 4th amendment to said Constitution in that it authorizes unreasonable searches by the Secretary of Agriculture respecting books and papers which do not relate to any property upon which a tax is imposed, nor to any transaction within the commerce power of Congress.

(8) It violates the 5th amendment to said Constitution in that it deprives members of said Board and of other grain exchanges of the right to contract for the purchase of grain for future delivery as fully as other owners and growers of grain and of land on which the grain is grown, and associations of such growers are permitted by the law to contract.

14. That your orators did, on the 18th day of October, 1921, request the board of directors of said Board to cause said Board to institute a suit to have such "Future Trading Act" adjudged unconstitutional before complying therewith, but said board of directors has refused to comply with said request, and state that they intend to comply with the provisions of said Act and that your orators are informed and believe that said Board of Directors refused said request because they fear to antagonize the public officials whose duty it is to construe and enforce said Act and that your orators fear that, acting under the coercion imposed upon them by said Act, said Board of Directors will admit to membership in said Board authorized representatives of co-operative associations of producers in order to comply with sub-clause (a) of Section 5 of said Act, and will apply to said Secretary of Agriculture to designate such Board as a contract market under said Act, and will do all acts necessary to enable

said Board to be designated as a contract market, unless said directors and said Board shall be enjoined by this court from so doing; and that such action by said Board of Directors will cause irreparable injury to your orators and other members of said Board; that there is no collusion between your orators and any of said Board of Directors to confer on a court of the United States jurisdiction of a cause of which, it would not otherwise have jurisdiction; and that as respects each of your orators, the amount involved and the matters in dispute in this suit, exclusive of interest and costs, is more than \$3,000.

15. Forasmuch, therefore, as your orators are remediless in the premises except in a court of equity, and to the end that said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue for the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters

Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, as directors of said Board, and John R. Mauff, as its Secretary, may be required to make direct, true and complete answer to this bill, but not under oath (answers under oath being hereby waived); that each and every provision of said Future Trading Act be adjudged to violate the Constitution of the United States and to be void, and that a temporary injunction may immediately issue and upon final hearing, be made permanent; (1) enjoining said Henry C. Wallace, as Secretary of Agriculture, from taking any steps whatever, legal or otherwise, to induce or compel said Board of Trade or its directors to comply with sub-clause (c) of Section 5 of said Future Trading Act or to be designated a contract market under said Act, or to compel said Board or any of its members to comply with any of the provisions of said Act, and also enjoining said Wallace from requiring said Board or any of its members to make any report or keep any record relating to any contracts for future delivery made upon the exchange of said Board, and from taking any other steps or do any other act authorized or required by such Future Trading Act as respects said Board or its members; (2) also enjoining and restraining and David H. Blair as Commissioner of Internal Revenue for the United States, John C. Cannon as Collector of Internal Revenue for the First District of Illinois and Charles F. Clyne, District Attorney of the United States for the Northern District of Illinois, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty, or fine, mentioned in, or imposed by said Act, from any member of said Board; (3) and also enjoining said Board, and each of its said officers and directors, from applying to said Secretary of Agriculture to have said Board designated as a "contract market" under said Act, and from admitting to membership in said Board any representative of any co-operative association of producers in compliance with, or under the terms specified in sub-clause (c) of Section 5 of said Act, or from taking any other steps for the purpose or with the intent to comply with the said Act; and that your orators may have such other and further relief as to your Honors shall seem meet.

16. May it please your Honors to grant unto your orators a preliminary and permanent injunction against said defendants as above prayed, and also a writ of subpoena of the United States directed to said Harry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward T. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M.

Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade commanding them on a day certain to appear and answer this bill, and to abide by and perform such decree as may be entered by this court.

ROBBINS, TOWNLEY & WILD,
Solicitors for Complainants.

HENRY S. ROBBINS,
Counsel.

25 STATE OF ILLINOIS,
County of Cook, ss:

John Hill, Jr., being duly sworn, says that he is one of the complainants in the foregoing bill, and that he has read said bill and knows the contents thereof, and that all the allegations of said bill are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JOHN HILL, JR.

Subscribed and sworn to before me, a notary public in and for said county and state, this 25th day of October, A. D. 1921.

OLIVE M. BUGGIE, [SEAL.]
Notary Public.

26 EXHIBIT A.

Charter of Chicago Board of Trade.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. That the persons now composing the Board of Trade of the City of Chicago, are hereby created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago," and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars); may have a common seal, and alter the same from time to time; and make such Rules, Regulations and By-Laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

Sec. 2. That the Rules, Regulations and By-Laws of the said existing Board of Trade shall be the rules and By-Laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said Association, known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall

regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

Sec. 3. The officers shall consist of a President, one or more Vice-Presidents, and such other officers as may be determined
27 upon by the Rules, Regulations, or By-Laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the Rules and Regulations of said corporation hereby created, and until their successors are elected and qualified.

Sec. 4. The said corporation is hereby authorized to establish such Rules, Regulations and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

Sec. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the Rules, Regulations and By-Laws of said corporation.

Sec. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the Rules, Regulations and By-Laws thereof.

Sec. 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the Association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

Sec. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken
28 within the time fixed by the Rules or By-Laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

Sec. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts; and the President or Secretary is hereby authorized to administer such oaths of office as may be prescribed in the By-Laws or Rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the Rules or By-Laws of said corporation, and may be sued and the

moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

Sec. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine, measure, weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation, or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors; nothing herein contained, however, shall compel the employment, by any one, of any such appointee.

29 Sec. 11. Said corporation may inflict fines upon any of its members, and collect the same, for breach of its Rules, Regulations, or By-Laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

Sec. 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill.

WM. R. MORRISON,

Speaker of the House of Representatives.

JOHN WOOD,

Speaker of the Senate.

Approved February 18, 1859:

WM. H. BISSELL.

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EXHIBIT B.

Containing Certain Rules of the Board of Trade.

Rule IV.

Sec. 9. When any member shall be guilty of improper conduct of a personal character in any of the rooms of the Association, or shall violate any of the rules, regulations or by-laws of the Association or shall be guilty of any dishonorable conduct, for which a specific penalty has not been provided, he shall be suspended by the Board of Directors from all the privileges of membership for such period as in their discretion the gravity of the offense committed may warrant. When any member shall be guilty of making or reporting any false or fictitious purchase or sale, or where any member shall be guilty of an act of bad faith, or any attempt at extortion or of any dishonest conduct, he shall be expelled by the Board of Directors. Or when a member shall, either in the Exchange building or elsewhere, contract

to give to himself or another the option to sell or buy any of the articles dealt in on this Exchange in violation of any criminal statute of this State, he shall forfeit the right to have said contract enforced under the rules of this Association.

Any member suspended from the privileges of the Association shall not be allowed to trade or do any business upon the floor of the Exchange in his own name, either through a broker or employe.

* * *

Sec. 16. All charges made to the Board of Directors against any member of the Association for any default, misconduct or offense, shall be in writing, and in duplicate, and shall state the default, misconduct or offense charged; and the same shall be signed by
 31 one or more members of the Association, by a business firm, one or more of whose members shall be a member of the Association, or by the Chairman of a committee of the Association.

Rule X.

Membership and Assessments.

Section 1. All applications for membership in the Association shall be referred to the Committee on Membership, who shall hold regular stated meetings for examining such applicants and their sponsors, in person, under such rules and regulations as may be made by the Board of Directors. Any male person of good character and credit, and of legal age, on presenting a written application, indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership upon approval by at least ten (10) affirmative ballot votes of the Board of Directors; provided, that three negative ballot votes are not cast against such applicant, and upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-Laws of the Association, and all amendments that may be made thereto.

Sec. 2. Every member shall be entitled to transfer his membership when he has paid all assessments due, and has against him no outstanding unadjusted or unsettled claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited, upon the payment of two hundred and fifty
 32 dollars, to any person eligible to membership who may be approved for membership by the Board of Directors, after due notice by posting, as provided in Section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative without the payment of the transfer fee. Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for at least ten days when, if no objection is made, it shall be assumed the member has no outstanding claims against him.

Rule XXI.

Regular Deliveries.

Section 1. All deliveries upon contracts for grain or flax seed, unless otherwise expressly provided, shall be made by tender of regular warehouse receipts, which receipts shall have been registered by an officer duly appointed for that purpose. All such warehouse receipts shall be made to run five days from date of delivery on regular or customary storage charges, which regular or customary charges shall follow such warehouse receipts and be chargeable upon the property covered by the same, and shall be issued by such houses as have complied with the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors, and have been declared regular warehouses for the storage of grain or flax seed by said Board of Directors; and it shall be the duty of the Board of Directors, prior to the first day of July in each year, to inspect all warehouses, the proprietors or managers of which shall apply to have their receipts declared regular for delivery on contracts under the Rules of the Board of Trade, and no warehouse shall be declared a regular warehouse unless it is conveniently approachable by vessels

of ordinary draft and has customary shipping facilities, and
 33 unless the storage rates on all grain or flax seed in such warehouses in bulk and in good condition, shall not be in excess of one and one-quarter ($1\frac{1}{4}$) cents per bushel for the first ten days or part thereof, and one-twentieth ($1/20$) of one cent per bushel for each additional day thereafter so long as such grain or flax seed remains in good condition, and unless the proprietors or managers of such warehouse are in good financial standing and credit and are carrying on and intend to continue to carry on the legitimate business of public warehousemen under the laws of the State of Illinois and in accordance with the Rules of the Board of Trade of the City of Chicago and the Regulations and Requirements of the Board of Directors and until the proprietors or managers of such warehouse shall file a bond with sufficient sureties in such sum and subject to such conditions as may be deemed necessary by the Board of Directors, under the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors in reference to warehouses. * * *

Warehouse receipts issued by warehouses so declared regular by the Board of Directors shall be regular for delivery on contracts under the Rules of the Board of Trade so long as the said warehouse shall continue to be a regular warehouse, but the term for which any warehouse is declared a regular warehouse to issue such receipts shall be limited to and expire on the first day of July in each year. No receipts issued on grain received in any warehouse shall be regular for delivery under the Rules of the Board of Trade after that date unless the warehouse upon which it has been issued has again been declared a regular warehouse by the Board of Directors; provided, however, that receipts issued before the first day of July by warehouses which

have been regular warehouses during the preceding year, but which have not been declared regular for the succeeding year, shall be regular for delivery upon such contracts for six months after the first day of July; but nothing contained herein shall prevent the Board of Directors from declaring any warehouse, or the receipts thereof, irregular at any time for violation or non-compliance with the laws of the State of Illinois or any of the Rules of the Board of Trade or of the Regulations and Requirements of the Board of Directors.

Provided, that the Board of Directors shall have power, when in their judgment an emergency exists requiring more storage room than can be supplied by the regular elevator warehouses, or because of an inability to obtain insurance on grain stored therein, to declare any store-houses, vessels or places suitable for the storage of grain or flax seed within the Chicago Switching District—wherein the cost of delivery to vessels or railroad cars shall not be greater than such as is made by the regular elevators for the same service—to be regular places for the storage of grain deliverable under the Rules of the Board of Trade.

And provided further, that in case it shall happen that at any time there shall be no warehouses which shall be regular warehouses for the storage of grain and flax seed, then the Board of Directors may declare any warehouses suitable for the storage of grain or flax seed, whose aggregate capacity shall not exceed twenty-five million (25,000,000) bushels, regular warehouses for the storage of grain or flax seed, upon such terms and for such period as the Board of Directors in its discretion may deem necessary or proper, and the warehouse receipts issued by warehouses so declared regular under this proviso, shall be regular for delivery on contracts under the Rules of the Board of Trade, in the same manner as if issued by warehouses declared regular under the foregoing provisions of this section in regard to declaring warehouses regular for the term ending on the first day of July in each year.

On and after January 1st, 1915, grain in cars, including that graded "subject to approval," shall be deemed a valid tender on contracts during the last three business days of any month, under the provisions of the rules pertaining to the delivery of warehouse receipts—the railroad receipt issued against same evidencing ownership serving to convey the title to the grain, same as warehouse receipts issued against grain in warehouses—when conforming to the following requirements:

A. When within the Chicago Switching District; or, if arriving from outside of the same, when it has reached the railroad yards, where samples are taken by the Illinois State Grain Inspection Department, and when billed to an elevator the receipts of which are regular on delivery; provided nevertheless, that grain so delivered shall be unloaded into the elevator to which it is billed before the delivery shall be deemed complete, and bills for grain so tendered shall not be due and payable until the elevator receipt covering same shall have been delivered to the buyer. Provided further, that deliveries under this rule may be diverted by the buyer from unloading

at a regular warehouse to any other unloading where the same will be weighed by the Weighing Department of this Association, by paying for the property before diversion. * * *

E. At any time when, in the judgment of the Board of Directors, an emergency exists, grain in cars shall be deemed a valid tender on contracts, on any business day of any month, when the grade of such grain tendered is evidenced as being a proper grade under the rules for tender, by a certificate of inspection of the Illinois State Grain Inspection Department showing the inspection to have been made during the preceding seventy-two hours, and when conforming to the other requirements of Paragraphs A, B, C, and D of this Section, except that any excess or shortage in weights at time of unloading, if then weighed by the Weighing Department of this Association, shall be settled for at the current market value on day such variation is known to both parties.

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EXHIBIT C.

Grain Growers' Contract.

Revised Form.

This Agreement made and entered into this — day of —, 19—, by and between.....
.....
.....

(Here insert name of Elevator Company or Grain Growers' Association with whom the Grower contracts)

a corporation (or) an association duly organized and existing under the laws of the State of —, (hereinafter referred to as the Elevator Company), and having its principal place of business at — part of the first part, and the undersigned producer of grain as owner (entitled to crop rental) or as tenant, of land located in the County of —, State of —, (hereinafter referred to as the Grower) party of the second part,

Witnesseth:

That whereas the Elevator Company is the owner of, or has contracted for the use of, facilities for weighing, grading, storing and shipping grain in the county aforesaid, and has by contract with the U. S. Grain Growers, Inc. (hereinafter referred to as the U. S. Association), appointed the U. S. Association, an agricultural organization, instituted for the purposes of mutual help and not having capital stock or conducted for profit, as its exclusive sales agent for the marketing of grain of the members of said U. S. Association in order to correct the present wasteful and uneconomic methods of handling grain, and in order that the said grain can be marketed and distributed on a cost basis; and

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Whereas the Grower is a bona fide producer of grain in the virtue of owning or operating farm land, is entitled to

ownership and control of all or a part of the grain produced thereon, and is a member of the U. S. Association; and

Whereas the Grower desires to sell, and the Elevator Company desires to purchase, or handle for sale, all the grain that shall be produced as hereinafter provided;

Now therefore, the parties agree:

In consideration of the mutual obligations of the respective parties hereto, of the outlays and expenses incurred, and to be incurred, by the Elevator Company in carrying out the purposes of this agreement, and in consideration of the benefits derivable from the contractual affiliations of the Elevator Company with the U. S. Association:

Section 1. The Elevator Company agrees that it shall provide by ownership, lease or otherwise, facilities for weighing, grading, storing and marketing grain; that it shall receive and handle as hereinafter specified, or shall purchase at prices, and upon such terms, as are hereinafter set forth, all the grain hereinafter mentioned tendered to it by the Grower in accordance herewith; that it shall market all said grain through the U. S. Association according to the terms and conditions of the contract between the U. S. Association and the Elevator Company, a copy of which is attached hereto and made a part hereof as though copied herein.

This contract shall govern all the grain which is controlled by the Grower, and produced upon land described in the preamble of this agreement which he now owns, or shall hereafter own or operate during the life of this contract, and all such grain as he now has in possession, but not grain required and used by the Grower, or
40 sold by him locally for local use for seed or feed, or sold otherwise with the written approval of, and upon the terms and conditions prescribed by, the U. S. Association.

Section 2. During the life of this contract the Grower agrees to deliver and sell to the Elevator Company, or otherwise market through said company, all the grain covered by this contract, and grown upon the land above described, at a price to be determined as hereinafter set forth.

Section 3. It is hereby agreed that nothing in this contract shall deprive the Grower of control in any degree over his own acreage or production.

Section 4. This contract shall become effective with respect to its provisions concerning grain, 10 days after receipt by the Grower of a written notice to that effect by the Elevator Company. This contract shall be in effect from such date to June 30, 1927.

This contract shall extend automatically and continue in full force and effect as to each of the parties hereto from year to year after June 30, 1927, until the same shall have been terminated by either party as to any kind of grain in accordance with the following terms and conditions:

(a) Notice in writing of said termination must be given by such party desiring the termination to the other party at least forty-five days, and not more than sixty days, prior to the close of the contract year, at the end of which it is sought to terminate the contract.

(b) The party desiring to make such termination must, prior to the effective date of such termination, pay any indebtedness then due the other party.

(c) If the foregoing conditions are fully complied with, this contract shall thereupon be terminated on the date named; provided, however, such termination shall not affect any uncompleted sales or transactions or uncompleted obligations or current commitments between the parties hereto; nor release either from any indebtedness then unpaid or hereafter accruing under the contract.

Section 5. The title to the grain covered by this contract shall remain with the Grower, unless otherwise specified herein, until delivered at point of storage or shipment designated by the Elevator Company; at the time of such delivery title to the said grain shall pass to the Elevator Company when paid for, except when otherwise agreed upon by the parties hereto, except as to shipment by the Grower on consignment, in which case title shall remain with the Grower until sold by the U. S. Association, and unless some other arrangement shall be effected by mutual agreement between the parties at the time of the transaction.

Section 6. Upon notice in writing to the Elevator Company by the Grower, the contract between the Grower and said Elevator Company may be transferred to such other elevator company affiliated by contract with the U. S. Association, as the Grower shall designate, upon such terms as the U. S. Association shall approve.

Upon dissolution of the elevator company or failure for any other reason of said elevator company to function under the terms of the contract all right, title, interest and obligations of the elevator company shall immediately be transferred to the U. S. Association and shall then be subject to assignment to such other elevator company or grain growers' association as the U. S. Association shall elect.

It is further agreed that the Grower may, from time to time, deliver his grain covered by this contract to another elevator company than the one executing this contract, provided the other elevator company has executed a contract with the U. S. Association for the exclusive handling of growers' grain through that agency, and provided the condition of the roads or inability of the Elevator Company to handle the grain because of lack of storage, or transportation facilities, renders it necessary, or for any other reason held to be good and sufficient by the U. S. Association.

Section 7. This contract cannot be assigned, unless otherwise specifically provided herein, to any person except to the purchaser of, and in connection with the bona fide sale of, the land owned

the Grower at the time of the execution of this contract, or except as it may be assigned by one tenant to another tenant, by an owner to a tenant, or by a tenant to an owner, succeeding to the former respectively in the operation of the land covered by this contract. In case of such transfer, this document may be filed with the Elevator Company, and a new contract may be executed in lieu thereof. Any other attempted assignment shall be of no force or validity whatsoever.

Section 8. This contract shall be terminated whenever the Grower shall for any reason be expelled from membership in the U. S. Association; but such expulsion shall not affect the rights and liabilities of the parties hereto as to the unmarketed grain then in the possession of either party.

Section 9. Whenever the Grower delivers any grain to the Elevator Company, he shall give the Elevator Company a signed statement showing what liens, if any, there are upon such grain; and the Elevator Company shall have the right to pay off all or 43 any part of the said lien or liens in order to perfect further its title to the grain, and thereupon the said Elevator Company shall make proper deductions for the same from the proceeds of the sale of said grain belonging to the Grower. If the amount of said liens is excessive in the judgment of the Elevator Company, the Grower hereby agrees to pay off sufficient to reduce the same to the amount stated by the Elevator Company to be reasonable, or the Elevator Company may handle said grain on the consignment basis, by and with the consent of the mortgagee.

Section 10. The Elevator Company agrees to observe and perform such rules and regulations covering the inspection, grading and weighing of grain as may be established by the U. S. Association not in conflict with state and federal rules, regulations and statutes.

Section 11. From time to time, upon the reasonable request of the Elevator Company, the Grower shall furnish such crop and statistical data as requested, on the forms provided for that purpose by the Elevator Company or the U. S. Association. The Elevator Company, upon the reasonable request of the Grower, shall furnish the Grower for his use such information concerning market conditions and quotations as it shall have in its possession.

Section 12. The Elevator Company shall pay, and the Grower shall accept as payment, for any and all of the grain covered by this contract, a price to be determined by one of the methods described in Sections 13 and 14, as the Grower may elect. The said right of election applies to each kind of grain separately.

Section 13. Method A. Individual Sales Method.—The Grower shall sell to the Elevator Company all grain covered by this contract which is not otherwise provided for by a valid election of the 44 said Grower, in accordance with either of the following methods, Method A-1 or Method A-2, or by any other method

mutually agreed upon which is in harmony with the other provisions of this contract. The Grower shall declare his choice of method at the time of the delivery of the grain to, or upon the order of, the Elevator Company.

A-1. He may sell for cash at a price offered by the Elevator Company.

It is expressly understood and agreed that the Elevator Company shall resell grain so purchased from the Grower through the U. S. Association but the same shall be sold at the discretion of the Elevator Company in respect to time, place and quantity, and without regard to the action of other companies or individuals employing the U. S. Association as a sales agent.

A-2. The Grower, singly or jointly with other growers, may consign grain through the Elevator Company for sale by any method by the U. S. Association, in which case control of time of delivery, shipment and sale shall remain with the Grower, and the net proceeds of sale, less deductions for costs of handling, as hereinafter provided, shall be returned to the Grower. This is without regard to the action of other individuals and companies employing the U. S. Association or Elevator Company as sales agent.

The Elevator Company is hereby exempted from liability for losses in handling, storing, shipping and marketing grain committed to it on the consignment basis, where the negligence of the Elevator Company is not the proximate cause of such loss or damage.

In all shipments by the Individual Sales Method, the U. S. Association shall act solely as sales agent for the Grower or the Elevator

45 Company, and shall exercise no power of regulation or control over time of sale, time of shipment, destination, quantity of grain to be sold, or over the price at which the grain shall be sold, except as the Grower, under Method A-2, or the Elevator Company, under Method A-1, from time to time may, at their option, delegate to the U. S. Association authority to determine such questions as to individual transactions.

Inasmuch as the failure or refusal of the Grower to deliver to, and market and sell through, the Elevator Company the grain governed by this contract will cause detriment and injury to the Elevator Company, will impair its efficiency and the obligations of contracts to which it is a party, and will increase its expense and liability to damage, all of which items it is impracticable and extremely difficult to fix with precision; therefore, if the Grower shall fail or refuse to market or to sell through or to the Elevator Company any grain covered by this agreement, then the Grower agrees to pay to the Elevator Company, and the Elevator Company agrees to accept, the following sums per bushel: wheat, 10c; rye, 10c; flax, 20c; and all other grain, 6c; for all grain covered by this contract which is sold, marketed or withheld by or for the Grower other than in accordance with the terms hereof, as liquidated damages for the breach of this contract. The above agreed items are predicated upon average prices and market conditions for a period of years.

None of the aforesaid payments are to be construed to be a penalty

or forfeiture but as stipulated liquidated damages which are hereby agreed to as reasonably representing throughout the period covered by this contract what the Elevator Company and the members thereof will suffer by reason of such refusal or default.

This option, described as Method A, ^{45 1/4} is severable and distinct from the provisions contained in Method B, is dependent upon the consideration of the obligation of the Elevator Company to furnish facilities for the efficient marketing of grain through itself and affiliated companies and associations, upon the considerations stated in other sections (excepting therefrom Sec. 14) of this contract, and upon the consideration of the obligation of the Grower to sell all his grain covered by this contract to or through the Elevator Company; and the validity and binding effect of the provisions contained in this Section (13) shall in nowise be dependent upon, or related to, the provisions contained in Section 14 of this document.

All the provisions of this contract, save those contained in Section 14, shall apply with full force and effect to the sales of grain governed by this Section entitled "Method A."

Section 14. Method B. Pooling Method.—

B-1. Local Pool.—(a) The Grower may agree to have all of any kind of grain delivered by him to the Elevator Company commingled and mixed with grain of like kind and grade delivered by other growers, and the same sold during such period of time as may be agreed upon between the growers, provided storage and transportation facilities shall permit, in which case he shall receive, as payment, the average price secured for all grain of like kind and grade so co-mingled and sold, less deductions for costs of handling, as hereinafter provided, and subject to such equitable differentials as said company may find necessary to establish. The various lots of grain sold under this method shall be known as pools. There may be established as many pools of grain as there are kinds and grades of grain to be handled. The pools shall include all the commitments for any one year.

(b) The price on the grain delivered by the Grower shall ^{45 1/2} be uniform with that paid other growers regardless of any variations in the price received from such sales for the several products of like kind and quality, subject to the differentials applicable, and deductions for the cost of handling.

(c) On or before the first day of May of each calendar year (or at a later date if no such action has been taken previously, provided ten or more growers so desire) all the growers tributary to the Elevator Company and signing this or other similar contract with the Elevator Company, who have elected to participate in the pooling of any kind of grain, may choose from among their number a committee of three, to be known as the Local — Pooling Committee (stating in the blank the kind of grain) hereinafter designated the Local Pooling Committee, which committee shall exercise complete

control over the handling, shipping and selling of all pooled grain, determining the time, quantity and destination of sales, and effecting all necessary contracts and other arrangements for storage, etc., which may be deemed necessary for the efficient marketing of said grain; provided, however, that these provisions do not apply to "joint pools," Method B-2, where the U. S. Association shall be in control. The person designated by the Local Pooling Committee to have charge of the handling of grain that is pooled and the proceeds of the sale of same, shall file a bond with the U. S. Association as trustee for the growers joining in the pools subject to their jurisdiction; the said bonds shall be in such form, and amounts, and with such sureties as required by the U. S. Association, guaranteeing the faithful performance of the duties of the said person so designated. The U. S. Association, on request, shall furnish all necessary plans, contracts, forms, etc., for the proper handling of the pools. The

46 said Local Pooling Committee, at the option of the majority of said committee, may delegate its powers to the Elevator Company, or other agency, on condition that the grain is marketed through the U. S. Association.

(d) The purpose of these provisions is to secure control over the pooling of any kind of grain in the hands of those who pool. If satisfactory arrangements cannot be made with the Elevator Company for handling the pooled grain, then the said Local Pooling Committee, or committees, handling one or more kinds of grain, shall have the privilege of contracting for the storing and handling of the said grain or grains through any other elevator or warehousing company or agency as they may determine, without any regard to any conflicting provisions in this contract; provided the other agency handling the same shall contract for the exclusive marketing of the said grain through the U. S. Association.

In the election of said Local Pooling Committee each of the said growers shall have one, and only one, vote. The period for which said Local Pooling Committee shall be chosen shall be the period which will include all the pools of that kind of grain for that year, or until the successors are elected and qualified. The compensation, if any, of said Local Pooling Committee shall be at the option of the growers so pooling their grain, and shall be paid by them pro rata.

(e) The Local Pooling Committee shall have authority to determine when deliveries of grain shall be made. A Grower may express his preference and the Local Pooling Committee will be guided thereby so far as practicable.

(f) The Local Pooling Committee shall weigh, classify and grade the grain delivered to the pools by the Grower; credit the Grower therewith; mingle or pool said grain with grain of like kind and grade delivered to the pools by other growers; and, at its discretion, clean, condition, blend or process the pooled grain to increase its value as food or as an article of commerce.

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(g) The Local Pooling Committee shall furnish the Grower a "delivery ticket," and such other documents as may be required, upon the delivery of his grain, which shall show the classification, grade and weight of the grain delivered, the pool to which it has been committed, and any advance payment made upon it, and other information that may be required.

(h) The Local Pooling Committee shall determine the grade and quality of all grain tendered in accordance with rules and regulations established by the U. S. Association for pooling purposes. Regardless of what grade shall be ultimately placed upon said grain at the terminal markets, the aforesaid grading by the Local Pooling Committee shall control the proportional distribution of the net proceeds from the sale of said grain among the growers participating in any pool.

(i) The Local Pooling Committee shall sell through the U. S. Association the grain so pooled, at such times, in such quantities, and for such deliveries, as the Local Pooling Committee shall deem advantageous, and at the best prices obtainable through the U. S. Association under market and transportation conditions, together with grain of like classification delivered to the pool by other growers who have signed this or a similar contract, and pay over the net amount realized therefrom as payment in full to the growers, according to the value of the grain delivered by each of them, due debit and credit being given for all deductions for cost of handling, differentials and adjustments made by the Local Pooling Committee.

48 (j) In order to compensate properly the holder of delayed shipments, reasonable carrying charges on different kinds and grades of grain may be fixed from time to time by the Local Pooling Committee, to be credited to growers selling on the pooling basis.

(k) The Local Pooling Committee may transfer pooled grain from the local elevator to terminal or other elevators for storage, or other purposes.

(l) The Local Pooling Committee is authorized to exercise, without limitation, all the rights of ownership over the grain covered by this contract; to mortgage, pledge or hypothecate in its name, on its own account, all such grain, or evidences of the ownership or control of said grain, including bills of lading, warehouse receipts, etc. The Local Pooling Committee shall distribute said funds pro rata among the growers participating in the pool, or it may use part thereof for meeting expenses in the handling of the pooled grain.

(m) Any deductions or loss occasioned by the delivery on the part of the Grower of grain of inferior grade or condition, shall be charged against the Grower, and deducted accordingly from the proceeds going to the said Grower.

(n) Losses occurring in the handling, storing, shipping or marketing of pooled grain, not covered by paragraph (m), shall be

charged against the pool and not against the individual Grower delivering the grain directly affected thereby.

(o) The Local Pooling Committee shall make as substantial an advance payment on the grain committed to the pool as, in its discretion, market and financial conditions permit, and as soon as practicable after its delivery.

(p) The proceeds from the sale of grain shall be paid from
49 time to time, the final settlement being made within a reasonable time after the proceeds from the sale of all the grain in the pool have been received, and the deductions for costs of handling shall be determined.

B-2. Joint Pool.—When a Local Pooling Committee has been created, as above described, it shall be authorized to elect whether the grain delivered under this contract—that may be pooled with the grain of other growers locally—shall be pooled jointly with grain of like grade and variety of the growers in one or more other companies. In case the grower individually indicates his election to pool jointly (as provided in Section 23), or in case the local pooling committee elects the joint pool, then the undersigned grower hereby agrees that all of his grain so pooled shall automatically become committed for sale under the joint pooling method on the terms and conditions above specified as to the local pool except that the U. S. Association shall have the same control as the pooling committee does over the local pool, and shall have the grain sold in accordance with the provisions covering joint pools contained in the contract between the elevator company and the U. S. Association.

B-3. Partial Grain Pool.—The Grower may elect, by an appropriate entry at the time of execution hereof in Section 23, or at any subsequent time on an election blank to be provided by the U. S. Association for that purpose, to pool one-third of his grain therein. The term of such pool shall be from the date of such election to the termination of this contract.

The grain so pooled shall be under the control and management of the U. S. Association, which shall return to the growers joining in the said pool the total proceeds from the sale of the same less
50 handling costs, as is provided for Joint Pools. The U. S. Association may make such deductions and such advance payments as are provided for other methods of operation under this contract.

Inasmuch as the failure or refusal of the Grower to deliver to and market and sell through, the Elevator Company will impair its efficiency and the obligation of contracts to which it is a party, will increase its expense, and liability to damage, will hinder the collection of average prices on grain, to the detriment and injury of the other growers participating in the said pool, all of which items it is impracticable and extremely difficult to fix with precision; therefore, if the Grower shall fail or refuse to market or to sell through the Elevator Company any grain covered by this agreement, then

the grower agrees to pay to the Elevator Company, and the Elevator Company agrees to accept, the following sums per bushel: wheat, 10c; rye, 10c; flax, 20c; all other grain, 6c; for all grain covered by this contract which is sold, marketed or withheld by or for the Grower, other than in accordance with the terms hereof, as liquidated damages for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its value upon the adherence of each and all of the contracting parties to each and all of the said contracts. The above agreed items are predicated upon average prices and market conditions for a period of years.

None of the aforesaid payments are to be construed to be a penalty or forfeiture but as stipulated liquidated damages which are hereby agreed to as reasonably representing throughout the period covered by this contract what the Elevator Company and the members thereof will suffer by reason of such refusal or default.

In the event that it shall be necessary to enforce by judicial proceedings this contract as to grain pooled under Method B, the Elevator Company shall bring the action for the benefit of all growers who shall have committed their grain for handling under said method, and any damages recovered thereby shall be the property of said growers.

The Grower hereby elects to market his grain covered by this contract as indicated in Section 23, in accordance with Method B, during the period ending June 30, 1927, or the unexpired portion thereof. This election shall continue from year to year after said date, until revoked by written notice to the Elevator Company, which shall be given within sixty days, and not less than forty-five days, prior to the close of the contract year when the Grower desires this election to terminate.

The Grower reserves the right to make a similar election in the future on other grains if he so desires.

This contract to sell, described as Method B, whereby the Grower may pool his grain for sale, is severable and distinct from the provisions contained in Method A, is dependent upon the special consideration of the receipt of average prices from the sale of grain in the pool; and the validity and binding effect of the provisions contained in this Section (14) shall in nowise be dependent upon, or related to, the provisions contained in Section 13 of this document.

All the provisions of this contract, save those contained in Section 13, shall apply with full force and effect to the sales of grain governed by this section, entitled Method B.

Section 15. In the event that any one or more of the foregoing methods, which may be elected by the Grower, shall for any reason become inoperative, or be held to be illegal by a court of competent jurisdiction from which no appeal can be, or is taken, then, and in that case, the Grower shall have the option of electing one of the other methods named.

Section 16. The Elevator Company, for the sake of uniformity and in order to protect the Grower against the misuse of grain committed to it for sale under any of the methods described herein, and against the improper use of funds owing the Grower as the result of any pools established thereunder, agrees to be governed by and to use such receipts and accounting forms as may be prescribed and recommended by the U. S. Association, and that with respect to such grain to report to and accept accounting supervision by, the said U. S. Association.

The Elevator Company hereby agrees that all persons responsible for the custody of grain covered by this contract, or handling money derived therefrom, shall be adequately bonded, and that failing to require such bonds, the officers of the Elevator Company shall be personally liable for any default.

Section 17. Deduction for the Cost of Handling.—On all grain governed by this contract, the Elevator Company shall be authorized to deduct from the proceeds of the sale of said grain the following:

(a) The amount charged by the U. S. Association for the handling of said grain, in accordance with the contract between the U. S. Association and the Elevator Company, copy of which is attached hereto; and

(b) Such reasonable charges as may be established by the Elevator Company for handling, weighing, cleaning, storing or performing such other services in connection with the said grain as the Grower may request, or as may be authorized by the terms of this contract.

Section 18. It is mutually understood and agreed that the services rendered by the U. S. Association and all subsidiary companies are to be rendered to the Grower at cost; that the deductions for the cost of handling made from the proceeds of the sale of grain are payments on account; and that at stated periods the operating expenses will be determined, and any excess may be returned pro rata to the Grower, or invested in facilities for the more efficient marketing of the grain. Annual reports of the said receipts and expenditures shall be made, and copy of same shall be furnished each contracting Elevator Company. Deduction certificates, or other evidences of the same, shall be distributed among the growers in accordance with the provisions contained in the contract between the Elevator Company and the U. S. Association, copy of which is attached hereto.

Section 19. On grain purchased or handled on the basis of a price to be determined upon the net resale value thereof, less deductions for the cost of handling, the Elevator Company, regardless of who holds title, shall be liable for any loss or damage in the handling and storing of said grain, which is due to the negligence of the said company, but not otherwise.

It shall be the duty of the Elevator Company to keep fully insured all grain held in storage.

Section 20. It is mutually understood and agreed that the U. S. Association has a special property interest in the enforcement of this contract and may bring action thereon in its own name, in the name of the Elevator Company, or in the name of the Grower as the occasion may warrant.

Section 21. The Grower shall be permitted to market only that grain, under the provisions of this contract, which he himself, as land owner or tenant, has raised, or to which he is entitled from land which he may own and rent on the basis of a share of the
54 crops raised thereon.

Section 22. If the standard form of contract between the U. S. Association and the Elevator Company, referred to herein, shall be changed as to administrative details or methods of transacting business, said change shall be deemed made in the form of said contract attached hereto, and this contract amended accordingly.

Section 23. Part 1. Pooling Method.—

The Grower elects to market in accordance with B-1 known as the Local Pool the following grain covered by this contract: —.

The Grower elects to market in accordance with B-2 known as the Joint Pool the following grain covered by this contract: —.

The Grower elects to market in accordance with B-3 known as partial Grain Pool the following grain covered by this contract: —.

Part 2. Individual Sales Method.—

The Grower elects to market in accordance with Method A known as the Individual Sales Method the balance of the grain covered by this contract which is not listed under Part 1 of this section.

Section 24. The signature of the Grower to this instrument shall be considered an application for membership in the U. S. Association, with which the Elevator Company is affiliated. The said Grower agrees to comply with all the requirements as to membership, subscribes and agrees to the Certificate of Incorporation and By-laws of the U. S. Association, the receipt of a copy of which is hereby acknowledged by the Grower; and the Grower further au-

55 thORIZES the use of any or all of the \$10.00 initiation and membership fee, in hand, paid to the U. S. Association, to be used for organization, and other expenses incidental to the completion of the organization of the U. S. Association, the creation of and ownership of securities in subsidiary and affiliated companies and other agencies, the securing of memberships, the acquisition of terminal warehouse facilities and for all other purposes authorized and deemed necessary by the Board of Directors of the U. S. Association for the immediate handling and marketing of grain and for the efficient organization of the grain marketing machinery contemplated in this agreement.

Section 25. No party, his agent, or other representative, has the right to vary the terms of this written instrument; and it is ex-

pressly agreed that no oral changes or modifications of the same have been made.

In witness whereof, the parties hereto, after a full reading and consideration of the terms hereof, have executed this contract on the day and year first above written.

Sample copy.

_____,
(Signature of Elevator Company or Local
Grain Growers' Association.)

By _____,
(President,) *Party of the First Part.*

_____,
(Signature of the Grower.)
(*Party of the Second Part.*)

Post Office _____.

Witness:

_____.

Witness:

_____.

What acreage (1921) _____.

Corn acreage (1921) _____.

Oats acreage (1921) _____.

56 The U. S. Grain Growers, Inc., hereby acknowledges receipt of the \$10.00 initiation and membership fee from the above named applicant at the place and on the date last above written, and hereby admits the said Grower to membership, and approves the foregoing contract, and accepts and agrees to all obligations therein stated. If, for any reason, the said U. S. Association is not engaged in the actual sale of grain within two years from the date hereof, then the portion of the said \$10.00 which is not expended shall be returned to the said Grower who executed the foregoing application for membership.

U. S. GRAIN GROWERS, INC.,

By _____,
Agent.

Elevator Contract.

(Revised Form.)

This Agreement made and entered into this — day of — 19—, between the U. S. Grain Growers, Inc., a non-stock, non-profit corporation duly organized and existing under the laws of the State of Delaware (hereinafter referred to as the U. S. Association), party of the first part, and the _____, a corporation (or) association, duly organized and existing under the laws of — (hereinafter referred to as the Elevator Company, unless otherwise specifically indicated), party of the second part, Witnesseth:

In consideration of the mutual obligations of the respective parties hereto, of similar obligations between other elevator companies and the U. S. Association, of the expenses incurred and to be incurred by the Elevator Company in providing local facilities for weighing, grading, storing, handling, processing and shipping grain; of the undertaking on the part of the U. S. Association to provide
57 competent statistical, financial, and other expert assistants, to establish crop and market news gathering agencies, and to acquire the use of marketing facilities for the purpose of providing an efficient co-operative marketing system for grain for the purpose of providing the producers with better credit and storage facilities which will tend to make possible a more even distribution of grain throughout the year, thereby tending to stabilize prices; and in order to reduce waste in handling, to encourage a more efficient production, to reduce transportation costs by more direct shipments from points of origin to centers of consumption, to make less frequent and violent fluctuations in prices due to speculation, and to reduce the excessive costs occasioned by the present wasteful, un-economic system of marketing the grain crops of the United States.

Now, therefore, said parties agree as follows:

Section 1. The Elevator Company agrees to market through the U. S. Association all the grain committed to it for sale or shipment by members of the U. S. Association (hereinafter called the Growers) under the terms of a contract between the said growers and the Elevator Company (hereinafter referred to as the Growers' Contracts).

Sec. 2. The U. S. Association agrees to endeavor to sell said grain directly, or otherwise, to millers, manufacturers, exporters, or others within or without the United States at the best prices obtainable by it under market conditions, in accordance with the terms of this contract.

Sec. 3. Any grain from growers covered by this contract that is in possession of the Elevator Company and unsold upon the effective date hereof may be committed for sale under this contract.

58 Sec. 4. The U. S. Association shall make rules and regulations for standardizing the manner of keeping warehouse and elevator records and accounts and for making reports required by the U. S. Association; and the Elevator Company shall observe and obey all such rules and regulations and shall permit the examination or auditing of said records, accounts, and reports by the U. S. Association.

Sec. 5. The Elevator Company agrees to make reasonable requests of growers for such crop and statistical data as the U. S. Association may desire, and to transmit the same promptly to the said U. S. Association, using such forms for that purpose as may be provided by the said U. S. Association; and the U. S. Association, upon reasonable request therefor, shall furnish the Elevator Company for the use of the Grower, market news and other information

in its possession concerning the values and market conditions of grains and related products in this and other countries.

Sec. 6. The U. S. Association may make rules and regulations and provide inspectors and weighers to standardize the methods of weighing, handling, storing, and shipping of grain, subject to this contract; and the Elevator Company agrees to observe and perform any such reasonable rules and regulations as may be prescribed by the U. S. Association not in conflict with state and federal rules, regulations and statutes.

Sec. 7. The Elevator Company shall report to the U. S. Association any lien or liens upon the grain covered by this contract, and the U. S. Association may, within its discretion, pay off all or any part of such lien or liens and deduct such payments and any costs connected therewith from the proceeds of the sale of such grain. The Elevator Company shall warrant the title to all grain committed to the U. S. Association for sale, except as to any incumbrances reported to the Elevator Company in writing prior to the time of shipment.

Sec. 8. Upon that grain which is committed to the Elevator Company to be sold on the basis of a price to be determined from the net resale value thereof, less deductions for the cost of handling, the U. S. Association, within its discretion, may make advance payments as market and financial conditions warrant; provided, the Elevator Company shall fully protect the U. S. Association against losses thereby.

Sec. 9. It is expressly agreed and understood that all debts of the U. S. Association shall be incurred in its own name and without responsibility therefor on the part of the Elevator Company, except when specific authority or approval of the same in writing shall have been given by the Elevator Company.

Sec. 10. The U. S. Association is exempted from liability for losses incurred in marketing and selling grain covered by this contract that are not due to its own negligence.

The Elevator Company shall be responsible for and charged with allowances, deductions or losses made or sustained by the U. S. Association arising from the negligence of the Elevator Company.

Sec. 11. Joint Pools.—In consideration of the mutual obligations of the parties hereto, that the Elevator Company shall furnish the necessary facilities for local handling and shall sell exclusively through the U. S. Association the grain received from members of the U. S. Association, and that the U. S. Association shall undertake to supervise the joint pooling of grain as defined in the Growers' Contracts, and shall undertake to provide the facilities which may be reasonably necessary for the same, it is hereby agreed between said parties as follows:

(a) The Local Pooling Committee, as defined in the Growers' Contracts, or other duly authorized agency, shall

receive, weigh, process, warehouse, and ship all grain committed to a joint pool by members of the U. S. Association, subject to orders of the U. S. Association which shall be observed and performed insofar as the facilities available reasonably permit. The U. S. Association shall classify all pooled grain by variety, quality, grade, or any other commercial standard and mingle or pool said grain with grain of like classification committed to the pool by others participating therein.

(b) The U. S. Association may order the transfer of said grain to any elevator and direct the manner in which it is handled therein.

(c) The U. S. Association shall undertake to sell said grain, together with grain of like classification and grade committed to the pool by others, at its own discretion in respect of time, conditions and terms, at the best prices obtainable by it under market conditions, collect the proceeds, and shall pay over the net amount received therefrom, as payment in full, to the authorized representatives of those participating in the pool, according to the value of the grain contributed by each of them, after making deductions for the cost of handling and such other charges against said grain as are authorized by this contract, and also making such credits as may be due.

(d) The Growers under contract with the Elevator Company under the Growers' Contracts, participating in a joint pool, agree that their grain shall be so mingled and that the net returns therefrom, less all costs of handling, advances and charges, shall be credited and paid to them on a proportional basis, considering all differentials and adjustments, out of the receipts from the sale of all grain of like classification.

61 (e) The pool shall be for a crop year, and payment shall be made from time to time, as rapidly as practicable, within the discretion of the U. S. Association, in due proportion until the accounts of the pool are fully settled.

(f) The U. S. Association may borrow money in its name on the grain through drafts, acceptances, notes or otherwise, on any warehouse receipt or bill of lading, upon any accounts for the sale of the grain or on any commercial paper delivered therefor.

(g) Losses due to failure of customers or banks and losses occurring in the handling, storing, shipping or marketing of pooled grain shall be charged against the pool and not against the individual Grower or Local Pooling Committee or other agency delivering the grain directly affected thereby, provided the said loss is not due to the negligence of the said parties delivering the grain.

The foregoing agreement as to the handling of joint pools is severable and distinct from the balance of this contract; and the terms and conditions stated elsewhere in this agreement do not depend upon any of the provisions contained in this section.

Section 12. Deductions for the Cost of Handling.—The proceeds from all sales of grain made by the U. S. Association shall be paid by the purchasers thereof to the said U. S. Association, which proceeds shall be blended into one general fund; and the U. S. Association shall deduct from said proceeds such uniform amounts or percentages as shall be deemed necessary from time to time by the duly constituted officers or representatives of the U. S. Association in order to meet all expenses properly chargeable to the handling of such grain; and also certain other deductions shall be made in order to provide special funds for carrying out the purposes of the U. S. Association. The deductions stated in the preceding sentence shall be described in this and all related contracts as

62 deductions for the cost of handling. The net proceeds from said sales above advances which have been made by a properly constituted authority shall be paid to those entitled to the same in accordance with the usual customs of the trade in handling such transactions.

The special funds mentioned in the preceding paragraph shall include those deemed necessary by the board of directors of the U. S. Association for the acquisition by purchase, lease or otherwise, of the control of property to be used by the said association or affiliated organizations, for the retirement of obligations incurred in the purchase of such property or in the operation of the business of the said association; for any debt due and unpaid from the grower to the U. S. Association, and whenever otherwise specifically authorized in writing by the grower; for the creation of reserves for such retirements, for renewals; and for any other expenditures which the said U. S. Association, its officers or agents, are authorized to incur.

So far as practicable all capital expenditures and interest charges on investments in marketing facilities shall be incurred by self-sustaining subsidiary, or affiliated organizations, and appropriate charges shall be levied against the grain using the facilities furnished by such organizations. All operating and capital expenditures, which are lawfully incurred in accordance with the powers and duties of the U. S. Association, shall be prorated fairly and justly in accordance with the judgment of the officers of the U. S. Association against the grain necessitating such expenditures; provided, however, that if the grain is sold on a grain exchange, and no other service of a substantial character is rendered by the U. S. Association, the total expenditures which shall be considered chargeable against said grain

63 shall in no case exceed one per cent of its value, unless the standard charge for similar service shall be more than one per cent, in which case said total charges by the U. S. Association shall not exceed such standard charge. On other grain where facilities requiring capital investment are used, the maximum deduction for any one year from the proceeds of all sales of grain to be made for capital expenditures, interest charges, etc. (aside from ordinary operating, including overhead expenses) in order to acquire the ownership or control over marketing facilities shall in no case exceed one per cent of the value of the grain so handled by the U. S. Association. The distinction, in accounting, between capital and operating

come and expenditures, shall be in accordance, so far as practicable, with the rules adopted for common carriers by the Interstate Commerce Commission.

The amount of deductions for the cost of handling, as above specified, shall be estimated by the Board of Directors of the U. S. Association, and shall be so established as to yield as nearly as may be a sum of money equivalent to the operating and capital expenditures and reserves, and such other expenses as may be reasonably estimated as essential to be incurred by the U. S. Association, and its subsidiary organizations, for the ensuing year. In case a sum in excess of such requirement shall be collected during any fiscal year, it shall be set aside, or invested to meet the obligations or needs of the future, for the use and benefit of the Growers; unless the same shall be relatively large and substantial, in which case the U. S. Association may distribute all, or a part of the same, to its members in proportion to the grain sold through the U. S. Association, at such time as it shall determine. And the Elevator Company, for valuable consideration, receipt of which is hereby acknowledged, waives all right, title and interest in and to any portion of such funds.

It is understood and agreed that this contract and the contract between the Grower and the Elevator Company provide fully and adequately for the equitable distribution of the proceeds from the sale of grain by the U. S. Association or its subsidiary organizations, and that any charges and deductions hereunder revert back to the benefit of the Grower through his membership in the U. S. Association.

The U. S. Association shall issue certificates to the Elevator Company indicating the proportionate amounts of the deductions for capital expenditures and of the excess from other deductions attributable to grain received therefrom; and the Elevator Company shall issue proportionate certificates based thereon to the member of the U. S. Association. Such certificates shall indicate a pro rata interest in such deductions, distributable only in the form, at a time and in the manner determined by the U. S. Association. The said certificates shall be assignable freely by endorsement; but shall not be deemed as obligations of the U. S. Association with definite or other maturity, and shall not bear interest; and they shall not represent any obligations or rights, other than a proportionate ownership in certain assets held by the U. S. Association, which shall not be separable or subject to distribution during the life of the U. S. Association, except at the option of the duly constituted Board of Directors of the U. S. Association.

Section 13. Term of Contract.—This contract shall be in force from its execution to June 30, 1927, and thereafter shall continue in full force and effect as to each of the parties hereto from year to year, until the same shall have been terminated by either party in accordance with the following terms and conditions:

(a) Notice in writing of said termination must be given by such party desiring the same, to the other party at least forty-

five (45) days, and not more than sixty (60) days, prior to the close of the contract year, at the end of which it is sought to terminate the contract.

(b) The party desiring to make such termination must, prior to the effective date of the same, pay any indebtedness then due the other party.

(c) If the foregoing conditions are fully complied with, this contract shall thereupon be terminated on the date named. Provided, however, that this shall not affect any uncompleted sales or transactions between the parties hereto, nor release either from any indebtedness then unpaid or hereafter accruing under this contract, nor relieve the Elevator Company from its obligation to sell to or through the U. S. Association, nor the U. S. Association from its obligation to market and sell, as the agent of the Elevator Company, all of the grain committed to it or purchased by it from members of the U. S. Association that was grown during the preceding season or seasons subsequent to the execution of this contract.

Section 14. On all grain which has been delivered to and is under the control of the Elevator Company, and covered by this contract which the Elevator Company fails to market through the U. S. Association in accordance with the terms and conditions herein stated, the Elevator Company agrees to pay to the U. S. Association and said U. S. Association agrees to accept the following sums per bushel as liquidated damages: wheat, 5c; rye, 5c; flax, 10c; for all other grains, 3c.

Section 15. It is mutually understood and agreed that the U. S. Association has a special interest in the enforcements of contracts between its members and the Elevator Company and may bring action thereon in its own name, in the name of the Elevator Company, or in the name of the Grower, as the occasion may justify.

Section 16. If this contract is executed by the Elevator Company as distinguished from a Local Grain Growers Association, the said Elevator Company represents itself as incorporated under the Co-operative Law of the state where operating and as paying patronage dividends.

In witness whereof, the parties to this agreement have hereunto set their hands and seals, the day and year first above written.

U. S. GRAIN GROWERS, INC.

By _____,
President, Party of the First Part.

By _____,
President, Party of the Second Part.

Postoffice address: _____.

(Endorsed:) Filed Oct. 25, 1921. John H. R. Jamar, clerk.

67 [Endorsed:] 2400. U. S. District Court, Northern District of Illinois. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Bill. Robbins, Towley & Wild, Solicitors for Complainants.

68 And afterwards, to wit, on the 25th day of October, 1921, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

69 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

Tuesday, October 25, A. D. 1921.

Present: Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Order.

Upon filing the bill of complaint herein and upon motion of the plaintiffs' counsel,

It is ordered that the defendants show cause before this court at 10 o'clock a. m., on the 7th day of November, 1921, why a temporary injunction should not issue as prayed by said bill.

It is further ordered that until the hearing and decision of said motion, said Henry C. Wallace, Secretary of Agriculture of the United States, refrain from designating the Board of Trade of the City of Chicago as a contract market under the Future Trading Act, and from doing any other acts to compel said Board of Trade to comply with the provisions of said Act, and said Board of Trade of the City of Chicago and said Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Alexander L. Winters, Charles H. Stone, David H. Lipsey, Allan H.

Clement, Fred S. Lewis, James C. Murray and John R. Mauff refrain from applying to said Secretary of Agriculture for, or accepting from said Secretary of Agriculture, the designation of said Board of Trade as a contract market under said Future Trading Act, and from admitting to membership in said Board any representatives of any co-operative associations of producers, and from doing any other acts to comply with any of the provisions of said Act.

Enter.

KENESAW M. LANDIS,

Judge.

70½ And on, to wit, the 1st day of November, 1921, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Appearance in words and figures following, to wit:

71 In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Appearance.

We hereby enter the appearance of Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade, as defendants and of ourselves as counsel for said defendants in the above entitled cause.

TAYLOR, MILLER, DICKINSON &
PLAMONDON,

Solicitors for said Defendants.

GEORGE D. SMITH,
Counsel.

(Endorsed:) Filed Nov. 1, 1921. John H. R. Jamar, Clerk.

71½ And on, to wit, the 1st day of November, 1921, came the certain defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion to Dismiss in words and figures following, to wit:

72 In the District Court of the United States, Northern District
of Illinois, Eastern Division.

No. 2400.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Motion to Dismiss Bill of Complaint.

Now come Board of Trade of the City of Chicago, Joseph P. Griffin, president and a director of said Board of Trade, and James J. Fones and Theodore E. Cunningham, vice-presidents and directors of said Board of Trade, and Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis and James C. Murray, directors of said Board of Trade, and John R. Mauff, secretary of said Board of Trade, comprising a part of the defendants in the above entitled cause, by Taylor, Miller, Dickinson & Plamondon, their attorneys, and move the court to dismiss the bill of complaint in said cause for that:

Said bill of complaint is without equity on its face and does not state facts sufficient to constitute a cause of action in a court of equity.

Wherefore defendants pray that their said motion be sustained.

TAYLOR, MILLER, DICKINSON &
PLAMONDON,

*Solicitors for Board of Trade
of the City of Chicago.*

GEORGE D. SMITH,
Counsel.

(Endorsed:) Filed Nov. 1, 1921. John H. R. Jamar, Clerk.

72½ And on, to wit, the 7th day of November, 1921 came the
Defendant by its attorney and filed in the Clerk's office of said
Court a certain Motion to Dismiss in words and figures following, to
wit:

73 In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. Equity. No. 2400.

JOHN HILL, JR., et al., Complainants,

v.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To the Honorable the Judges of said Court in Chancery Sitting:

Comes now the defendant, Henry C. Wallace, Secretary of Agriculture of the United States, by Charles F. Clyne, United States Attorney for the Northern District of Illinois, appearing specially for the sole purpose of this motion and for no other purpose, and moves the Court to dismiss this suit as to him for the following reasons:

1. That said defendant, at the time of the commencement of this suit, was and now is a resident of the District of Columbia.

2. That said defendant is not a resident of the Northern District of Illinois.

3. That said defendant has not been served with process in said District or at all.

4. That the Court has no jurisdiction over said defendant.

CHARLES F. CLYNE,

United States Attorney,

Attorney for Defendant Henry C. Wallace.

FRED LEES,

Assistant to the Solicitor,

U. S. Department of Agriculture,

Of Counsel.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

74 [Endorsed:] Form No. 680. No. —. In the District Court of the United States for the Northern District of Illinois, Eastern Division. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Special appearance and motion to dismiss. Filed — — —, 19—. — — — Clerk, by — — —, Deputy. Charles F. Clyne, U. S. Attorney.

75 And on, to wit, the 7th day of November, 1921, came the Defendants by U. S. attorney and filed in the Clerk's office of said Court a certain Motion to Dismiss in words and figures following to wit:

76 In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. Equity. No. 2400.

JOHN HILL, JR., et al., Complainants,

v.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To the Honorable the Judges of said Court in Chancery Sitting:

Comes now the defendants, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, by Charles F. Clyne, United States Attorney for the Northern District of Illinois, and move the court to dismiss the bill of complaint heretofore filed in the above entitled cause upon the following grounds, to wit:

1. That this is a suit for the purpose of restraining the assessment and collection of a tax, contrary to Section 3224 of the Revised Statutes of the United States,

2. That the bill seeks to restrain the enforcement of a criminal statute, to wit, the Act of Congress approved August 24, 1911 (Public No. 66—67th Congress), known as The Future Trading Act, without showing that the complainants will suffer irreparable injury by its enforcement.

3. That the bill seeks to enjoin the enforcement of a valid Act of Congress, to wit, the Act approved August 24, 1911 (Public No. 66—67th Congress), known as The Future Trading Act.

CHARLES F. CLYNE,

*United States Attorney, Attorney for Himself
and Defendants and John C. Cannon.*

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

77 [Endorsed:] Form No. 680. No. —. In the District Court of the United States for the Northern District of Illinois, Eastern Division. John Hill, Jr., et al., Complainants, vs. Henry C. Wallace, Secretary of Agriculture, et al., Defendants. Motion to Dismiss. Filed — —, 19—. — —, clerk, by — —, Deputy. Charles F. Clyne, U. S. Attorney.

78 And afterwards, to wit, on the seventh day of November, 1921, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

79 In the District Court of the United States, Northern District
of Illinois, Eastern Division.

Monday, November 7, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

This cause came on to be heard at this term and was argued by counsel, thereupon, upon consideration thereof, now

It is ordered, adjudged and decreed that the motion for a temporary injunction be denied, and that the Bill be dismissed as to all the defendants for want of equity.

Enter.

KENESAW M. LANDIS,
Judge.

79½ And on, to wit, the 7th day of November, 1921, came the Complainants by their attorneys and filed in the Clerk's office of said Court a certain Petition for Allowance of Appeal in words and figures following, to wit:

80 In the District Court of the United States, Northern District
of Illinois, Eastern Division.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Petition for Allowance of Appeal.

John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glase, and Alonzo B. Lord, the complainants, conceiving themselves to be aggrieved by the decree of this court entered on the 7th day of November, 1921, dismissing the above entitled suit, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error this day filed herein and they pray that this appeal may be allowed and that a transcript of the record and all proceedings herein be forthwith transmitted to said court, and that the temporary restraining order issued here be continued in force for the purpose of enabling said complainants

to apply to the Supreme Court of the United States for the further continuance of said restraining order.

JOHN HILL, JR.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
CHARLES E. GIFFORD,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD,
By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

And on, to wit, the 7th day of November, 1921, came the Complainants by their attorneys and filed in the Clerk's office of said Court certain Assignments of Error in words and figures following, to wit:

In the District Court of the United States, Northern District of Illinois, Eastern Division.

JOHN HILL, JR., et al., Complainants,
vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Assignments of Error.

Now come the complainants, John Hill Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, and file the following assignments of error upon which they rely for grounds for reversal on the appeal in the above entitled cause:

1. That the District Court erred in dismissing said action for want of equity.
2. That the District Court erred in not entering a decree pursuant to the prayer of said bill.
3. That the District Court erred in not adjudging and decreeing that said Future Trading Act was void in toto because it violates the Constitution of the United States.
4. That the District Court erred in not adjudging Section 3 of said Future Trading Act contrary to the Constitution of the United States.
5. That the District Court erred in not decreeing that Section 4 of said Future Trading Act was unconstitutional and void insofar as it attempts to impose a tax of 20 cents on every bushel upon each contract of sale of grain for future delivery made by or through members of a board of trade which has not

been designated by the Secretary of Agriculture as a contract market.

6. That the District Court erred in not adjudging and decreeing that Section 5 of said Future Trading Act and each of the sub-clauses (A), (B), (C), (D), (E), and (F) thereof were void because they violate the Constitution of the United States.

7. That the District Court erred in not adjudging and decreeing that Section 6 and sub-clauses (A) and (B) thereof, of said Act were void because they violate the Constitution of the United States.

8. That the District Court erred in not adjudging and decreeing that Section 9 of said Future Trading Act was void because it violates the Constitution of the United States.

9. That the District Court erred in not adjudging and decreeing that Section 10 of said Future Trading Act was void because it violates the Constitution of the United States.

10. That the District Court erred in not adjudging said Act void for the reason that it attempts to deprive complainants and other members of said Board of Trade and said Board of Trade of their property without due process of law.

11. That the District Court erred in not adjudging said Act void in that it seeks and attempts to regulate commerce that is not interstate but purely intra-state in character.

12. That the District Court erred in not adjudging said Act void in that the taxes imposed by said Act are not a *a* legitimate exercise by Congress of its power to tax, but is a mere subterfuge, adopted for the purpose of regulating intra-state commerce.

13. That the District Court erred in not adjudging said Act void in that it authorizes unreasonable searches by the Secretary of Agriculture respecting the books and papers of members of the exchanges.

14. That the District Court erred in not adjudging said Act void in that it is class legislation and deprives members of exchanges of the right to contract for the purchase of grain for future delivery as others may.

JOHN HILL, Jr.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
CHARLES E. GIFFORD,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD,

By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

83½ And afterwards, to wit, on the 7th day of November, 1921, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

84 In the District Court of the United States, Northern District of Illinois, Eastern Division.

Monday, November 7, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

JOHN HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

Order.

Now come the complainants, and it appearing to the court that a petition for appeal and assignments of error have been filed herein,

It is ordered that an appeal to the Supreme Court of the United States from the decree entered herein on the 7th day of November, 1921, be and the same is allowed, that for the purpose of enabling said court to decide said appeal a transcript of record herein be forthwith transmitted to said court, and that complainants file their appeal bond in the sum of five hundred (\$500) dollars, to be signed by at least two of said complainants and by a surety to be approved by this court, and that the temporary restraining order heretofore issued continue in force until the Supreme Court shall act upon the application of the complainants to that court for a continuance of said order, provided, however, that such application shall be made within 15 days from the date hereof.

Enter.

K. M. L.,
Judge.

84½ And on to-wit: the 7th day of November, 1921, came John Hill, Jr., and Emil W. Wagner, as principals, and Fidelity and Deposit Company of Maryland, as surety, and filed in the Clerk's office of said Court a certain Bond on Appeal in words and figures following, to-wit:

85 Know all men by these presents: That we, John Hill, Jr., and Emil W. Wagner as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal

Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, in the full and just sum of Five Hundred (\$500) Dollars, to be paid to said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of November A. D. 1921.

Whereas, lately, at the November term, A. D. 1921, of the District Court of the United States, in a suit pending in said court between John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, as complainants, and said

86 Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, as defendants, a decree was entered on the seventh day of November, 1921, dismissing said bill for want of equity, and said John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, have obtained an order of appeal from said court to reverse the decree in the aforesaid suit and a citation directed to the said Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, Joseph P. Griffin, James J. Fones, Theodore E. Cunningham, Louis C. Brosseau, John

J. Bagley, James W. McCulloh, Joseph F. Lamy, Kenneth P. Edwards, Joseph Simons, William E. Hudson, Edward D. McDougal, Edwin A. Doern, Leander L. Winters, Charles H. Stone, David H. Lipsey, Allan M. Clement, Fred S. Lewis, James C. Murray, and John R. Mauff, citing and admonishing them to appear in the Supreme Court of the United States within thirty days from the date of said citation. Now the condition of the above obligation is such that if the said John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, shall duly prosecute their bill with effect, and answer all damages and costs if they shall fail to make good their plea; then the above obligation to be void, else to remain in full force and effect.

JOHN HILL, JR.

[SEAL.]

EMIL W. WAGNER.

[SEAL.]

[SEAL.]

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND.

By ARTHUR G. STANTER,

Agent and Attorney in Fact.

Approved:

TAYLOR.

K. M. L.

O. K.

CHARLES F. CLYNE.

TAYLOR, MILLER, DICKINSON &

FLAMONDON.

For Board of Trade of the City of Chicago.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

87 In the District Court of the United States, Northern District
of Illinois, Eastern Division.

D. C. Equity. No. 2400.

Jon- HILL, JR., et al., Complainants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al., Defendants.

To John H. R. Jamar, Clerk of the United States District Court for
the Northern District of Illinois, Eastern Division:

You will please prepare for the purpose of appeal a certified trans-
cript of the entire record in the above entitled cause.

ROBBINS, TOWNLEY & WILD,

Counsel for Complainants.

Received copy November 7th, 1921.

CHARLES F. CLYNE,
U. S. Attorney, N. D. Illinois.
 TAYLOR, MILLER, DICKINSON &
 PLAMONDON,
 GEORGE D. SMITH,
Attys. for Board of Trade of the City of Chicago.

(Endorsed:) Filed Nov. 7, 1921. John H. R. Jamar, Clerk.

88 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with *Præcipe* filed in this Court in the cause entitled John Hill, Jr. et al. vs. Henry C. Wallace, Secretary of Agriculture, et al., as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 8th day of November, A. D. 1921.

[Seal of Dist. Court U. S., Northern Dist. Illinois.]

JOHN H. R. JAMAR,
Clerk.

89 UNITED STATES OF AMERICA, ss:

The President of the United States to Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; John C. Cannon, Collector of Internal Revenue for the First District of Illinois; Board of Trade of the City of Chicago, et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein John Hill, Jr., et al. are Complainants, and you are Defendants to show cause, if any there be, why the decree rendered against the said Complainants as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Kenesaw M. Landis Judge of the District Court of the United States, this 7th day of November, in the year of our Lord one thousand nine hundred and 21.

KENESAW M. LANDIS.

Duplicate.

Nov. 8, '21.

Ack. Service for all parties for whom I have appeared.

CHARLES F. CLYNE,
*United States Atty.*Received a copy this 8th day of November 1921.
BOARD OF TRADE OF THE CITY OF
CHICAGO ET AL.,
By TAYLOR, MILLER, DICKINSON &
PLAMONDON.[Endorsed:] No. 2400. Supreme Court of the United States.
John Hill, Jr., et al. vs. Henry C. Wallace, Sec. of Agriculture, et al.
Citation to the Supreme Court of the United States. Filed Nov. 8,
1921, at — o'clock M. John H. R. Jamar, Clerk.

90 UNITED STATES OF AMERICA, ss:

The President of the United States to Henry C. Wallace, Secretary of
Agriculture; David H. Blair, Commissioner of Internal Revenue
of the United States; Charles F. Clyne, United States District At-
torney for the Northern District of Illinois; John C. Cannon, Col-
lector of Internal Revenue for the First District of Illinois; Board
of Trade of the City of Chicago, et al., Greeting:You are hereby cited and admonished to be and appear at a Su-
preme Court of the United States, at Washington, D. C., within thirty
days from the date hereof, pursuant to appeal filed in the Clerk's
Office of the District Court of the United States for the Northern Dis-
trict of Illinois, Eastern Division, wherein John Hill, Jr., et al. are
Complainants, and you are Defendants to show cause, if any there
be, why the decree rendered against the said Complainants as in the
said appeal mentioned, should not be corrected and why speedy jus-
tice should not be done to the parties in that behalf.Witness Kenesaw M. Landis Judge of the District Court of the
United States, this 7th day of November, in the year of our Lord one
thousand nine hundred and 21.

KENESAW M. LANDIS.

[Endorsed:] 616. No. 2400. Supreme Court of the United
States. John Hill, Jr., et al. vs. Henry C. Wallace, Sec. of Agricul-
ture, et al. Citation to the Supreme Court of the United States.On this 16th day of November, in the year of our Lord one thou-
sand nine hundred and 21, personally appeared James L. Fort before
me, the subscriber, John P. Cage, a notary public for the District of
Columbia, and makes oath that he delivered a true copy of the
within citation to David H. Blair, Commissioner of Internal Revenue
of the United States, at 5:25 P. M. on November 15th, 1921.

JAS. L. FORT.

Sworn to and subscribed the 16th day of November, A. D. 1921.

[Seal of John P. Cage, Notary Public, District of Columbia.]

JOHN P. CAGE,

Notary Public, District of Columbia.

91 [Endorsed:] File No. 28,571. Supreme Court U. S.,
October Term, 1921. Term No. 616. John Hill, Jr., et al.,
App'ts, vs. Henry C. Wallace, Sec'y, &c., et al. Citation and service.
Filed Nov. 16, 1921.

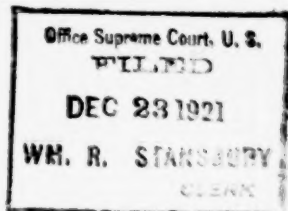
Endorsed on cover: File No. 28,571. N. Illinois D. C. U. S. Term
No. 616. John Hill, Jr., Reuben G. Chandler, Adolph Kempner,
et al., appellants, vs. Henry C. Wallace, Secretary of Agriculture;
David H. Blair, Commissioner of Internal Revenue of the United
States, et al. Filed November 10th, 1921. File No. 28,571.

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No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants.

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR
THE NORTHERN DISTRICT OF ILLINOIS.**

BRIEF FOR APPELLANTS.

HENRY S. ROBBINS,

Counsel for Appellants.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

STATEMENT.

This suit seeks to have declared unconstitutional an act of Congress known as "The Future Trading Act," which became a law August 24, 1921.

For this purpose appellants, who are members of the Chicago Board of Trade, filed in the District Court in their own behalf and that of all of its other members, a bill in equity against the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States District Attorney and Collector of Internal Revenue at Chicago (the officials charged with the enforcement of the

Act) and also against this Board of Trade and its directors.

The prayer of the bill is that these officials may be enjoined from enforcing as against said Board, and the Board and its directors may be enjoined from complying with, the provisions of this Act.

Upon motions therefor the District Court entered a final decree of dismissal for want of equity and this appeal was perfected directly to this court.

The Act is entitled, "An Act Taxing Contracts for the Sale of Grain for Future Delivery, and Options for such Contracts, and Providing for the Regulation of Boards of Trade and For Other Purposes," but the Act provides that it shall be known by the short title of "The Future Trading Act."

A copy of the Act is set out in the appendix to this brief. Its material provisions may here be summarized as follows:

It imposes a tax of 20c per bushel upon each bushel of grain involved in

(1) unilateral contracts commonly known as "puts" and "calls";

(2) contracts of sale of grain for future delivery, EXCEPT

(a) Where the seller is at the time of the sale the owner of the grain, or a grower thereof, or the owner or renter of the land on which the grain was, or is to be grown, or an association of such owners, growers, or renters; or

(b) Where such contract of sale is made *by or through* a member of a board of trade, which has been designated by the Secretary of Agriculture as a "contract market" and such contract is evidenced by a memorandum in writing giving in detail the terms thereof; and it is also provided that such board member shall keep such memorandum for three

years, or longer, if the Secretary of Agriculture so directs, and that such memoranda shall be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

Before the Secretary of Agriculture may designate a board of trade as a "contract market."

(a) It must be located at a terminal market upon which cash grain is sold in sufficient volumes, etc., to reflect the general value of the grain and which has recognized official weighing and inspection service.

(b) Its governing board must provide for the making and filing by the board, or members thereof, as the Secretary of Agriculture may direct, such *reports* as may be prescribed by him showing the details of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery, and such board must also provide, by such rules as the Secretary of Agriculture may direct, for the keeping by it, or its members, of *records* in permanent form showing the details and terms of all such transactions, the parties thereto, any assignments or transfers thereof, and the manner in which the same have been fulfilled, discharged or terminated. Such records must be kept for three years, or a longer period if the Secretary of Agriculture shall so direct, and must at all times be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

(c) It must prevent the dissemination by it, or its members, of any false or misleading report concerning crop or market conditions.

(d) It must provide for the prevention of the manipulation of prices and cornering of any grain.

(e) It must admit to membership "any duly authorized representative of any lawfully formed and conducted co-

operative association of producers having adequate financial responsibility; *provided*, that no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such cooperative association."

(f) It must provide for making effective the orders and decisions of the Secretary of Agriculture.

No board of trade may be designated as a "contract market" until it shall comply with the above conditions and give a sufficient assurance that it will continue to do so.

A Commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, is authorized to revoke the designation of any board as a "contract market" upon its failure to comply with the above requirements, or to enforce its rules of government which are made a condition of its designation as a "contract market."

The Secretary of Agriculture, upon notice to, and complaint against, any person violating the provisions of the Act, is authorized to order all "contract markets" to refuse trading privileges thereon to such person, and, as above stated, the board of trade is required by the Act to make such order effective—which it can only do, in the case of a member, by suspending or expelling him, and in the case of a non-member by requiring under penalty of suspension or expulsion all its members to refuse to accept orders from such proscribed non-member.

The Secretary of Agriculture is also authorized to make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and to publish the result of such investigation.

Any person who shall fail to evidence his contracts for future delivery by the required memoranda in writing, or

to keep the records, or make the reports required, or who shall fail to pay the tax, is guilty of a misdemeanor, punishable by a fine of not more than \$10,000 or imprisonment for not more than one year, or both.

As the bill was dismissed as upon demurrer, its allegations present the facts, which are as follows (Rec., 2-14):

The Chicago Board of Trade is a corporation created by a special charter granted to it by the State of Illinois in 1859 (Rec., 16-18), with power (1) to admit such persons as members, and expel such persons, *as it shall see fit*, (2) to maintain such rules and by-laws as it may think proper for the government of the corporation and for the management of the business of its members and the mode in which it shall be transacted, (3) to appoint committees of arbitration for the settlement of differences submitted by members or others, and the award in any such arbitration, when filed in the Circuit Court, is given the effect of a judgment, upon which execution may issue, (4) to appoint such persons as it may see fit to examine, measure, weigh, gauge, or inspect flour and grain, and the certificate of such appointees as to the quantity or quality, etc., shall be evidence between the buyer and seller assenting to the employment of such appointee.

Pursuant to its charter this Board has adopted and maintained for many years regulations respecting the inspection, sampling and weighing of grain, etc.

Its rules (Rec., 3-5), also vest the government of the Board in its board of directors, authorize such directors to determine what persons are of sufficiently good character and credit to be admitted to membership, and provide that each such applicant shall pay an initiation fee of \$25,000 or present an unimpaired membership to be

transferred, and shall sign an agreement to abide by the rules and by-laws of the association.

Such rules also provide for the suspension of any member defaulting on a business contract or in the payment of an award, and also provide that for certain other offenses he shall be suspended or expelled.

The Board has never admitted to membership any corporation; but its rules provide that, if any two members of the Board are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to trades or contracts on the exchange; but in that event these two members may be disciplined for any default on its contracts as fully as upon any business obligation of their own.

The Board has always levied annually an assessment upon its members sufficient in the aggregate to more than meet all its expenses, and with this surplus it has acquired real estate in the business district of Chicago, upon which it has constructed a large building, containing its trading hall and offices and also surplus space, from which it derives a substantial revenue. The fair market value of this property is \$2,000,000 over and above a mortgage thereon, and the yearly assessments of its members now aggregate \$240,000.

The Board itself transacts no business and pays no dividends. Its chief function is to provide an exchange room, where its members may meet daily between certain market hours, and make with each other contracts for the purchase of grain and other products of the farm. It also prescribes and enforces rules respecting its members' contracts, and enforces by disciplinary proceedings, when necessary, compliance by its members with their contracts; it also maintains and enforces rules for the settlement of disputes arising between its mem-

bers out of their contracts and displays in its exchange hall all available statistical and other news concerning crops, etc.; and about its only other function is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

The Board's main source of revenue is the annual dues paid by its members; and it is incumbent upon the Board to make it profitable for persons to become and remain members and to pay such yearly assessments; and, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for this Board, not only to make it profitable for members to remain such, but also to give a substantial value to its memberships. This the Board does by

- (1) Restricting the number of its members;
- (2) Providing that only members may make transactions in its exchange room;
- (3) Prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commissions which its members, when acting as agents, must charge their principals for making transactions on its exchange.

For this purpose the Board has for many years maintained (as do all commercial exchanges) a rule known as the "commission rule," which prescribes the minimum rates of commission.

An essential feature of this rule is a provision (Rec., 5) for the expulsion of any member who violates the rule or evades it indirectly by giving *rebates* to customers, etc.

Before this feature of the rule was added in 1900, memberships were selling at \$800 each, and since such amendment and its strict enforcement memberships have sold as high as \$11,000, and are now worth about \$7,000.

In recent years there have been organized in most of the grain-producing states many so-called farmers' cooperative associations, with the avowed purpose of enabling farmers, who become members thereof, to market their crop at actual cost and without paying any commissions to members of the exchanges. To attain this their plan is to have a salaried officer of the cooperative organization elected a member of the exchange, and through him to sell all the grain of members of this organization—he temporarily charging the prescribed commissions and ultimately rebating back to such members the aggregate of such commissions (after paying his salary and incidental expenses) on the basis of the number of bushels of grain each farmer shall have sold through the organization—such rebates being commonly called “patronage dividends.”

There has recently been organized a corporation known as “U. S. Grain Growers, Inc.,” membership in which is limited to producers of grain. This corporation is seeking to unite all farmers' cooperative organizations and elevator companies into one great movement—of which this “U. S. Grain Growers, Inc.,” will be the controlling element—for the purpose of selling the grain of its members at actual cost and without the payment of any commissions to members of any grain exchange (Rec., 5, 7, 22.)

In the past members of these cooperative associations have sought to become members of this Board; but they have been refused admission because their avowed purpose was to violate the commission rule of the Board which would destroy the business of those of its members who receive grain on consignment for sale, and the board avers that the ultimate effect of this would be to much impair, if not destroy, the value of all memberships, and make it difficult for the Board to retain sufficient men

bers to pay assessments necessary to maintain the exchange.

Members of the Board engage only in the following kinds of trading in grain:

1. Some members receive from producers or country grain dealers grain to sell on commission and pay to their principals the proceeds less their commissions; and members also, either as agents or principals, buy and sell grain for immediate delivery in Chicago. Such transactions are known as "cash" transactions, and by the terms of The Future Trading Act they are excluded from its provisions.

2. Many members of the Board send letters or telegrams at the end of each day to country points offering to purchase grain. When accepted these become contracts for the purchase of grain upon the condition that the grain is "to arrive" in Chicago within a certain time. (This kind of trading was involved in *Chicago Board of Trade v. United States*, 246 U. S. 231.) Other members in like manner make contracts for the sale of grain to be shipped from Chicago to milling or exporting points within a certain time. While, strictly speaking, all these contracts are contracts for future delivery, they are expressly excluded from the provisions of the Future Trading Act by being denominated therein as "cash sales for deferred shipment or delivery." Moreover, contracts of these two kinds are not strictly exchange transactions; that is, the offers are generally sent out from, and the acceptances are generally received at, the offices of members of the exchange. The contracts do not result from or in any trading on the exchange itself.

3. Another kind of trading consists in the making of unilateral contracts, known as "puts" and "calls." A "call" is a contract in which one person pays to another a

small sum (\$5.00 for every thousand bushels of grain involved) for the privilege of calling on the latter to deliver to the former at a future date a specified quantity of grain at a named price; and a "put" is a contract in which one acquires the privilege of delivering to another a certain quantity of grain within a certain time at a named price. When the course of the market makes it profitable for the paying member to exercise his option, he does so by making with the other member a bi-lateral contract for future delivery (such as is hereinafter more fully described) for the quantity and at the price named in the optional contract, or he delivers or receives in performance of the optional contract a warehouse receipt—issued by a grain-mixing elevator, which has been made regular by the Board. Upon contracts of this character, this Act imposes a prohibitive tax of 20c a bushel.

4. Many members daily engage, either as principals or agents, in the making in the exchange room of the Board of contracts with other members for the purchase and sale of grain for delivery during a certain named future month. Such contracts relate almost wholly to wheat, corn and oats, and the volume of trading in these commodities is so large that the Board has set aside in its exchange room for such trading three separate spaces, commonly known as "pits," where many of its members daily gather and by open *viva voce* bidding make these contracts for future delivery. The rules of the Board require that all orders received by members to buy or sell for future delivery shall be executed in the open market in the exchange room during the prescribed market hours (9:30 a. m. to 1:15 p. m.). In all such contracts the buyers and sellers are personally present in Chicago, and any offer to buy or sell for future delivery by a member in the exchange room during market hours becomes a contract with the member who first accepts the offer.

The bill sets out in detail the characteristics of such contracts. The only grain that can be delivered, or is contemplated to be delivered, on these contracts is grain that has already lost whatever interstate character it may have possessed. (This is more fully explained on pages 34 to 38 of this brief.)

For twenty years preceding the late war the price of wheat in Chicago has been generally below \$1.00 per bushel, the price of corn generally below 60c a bushel, and the price of oats generally under 40c a bushel. The tax of 20c a bushel imposed by The Future Trading Act is, therefore, a prohibitive tax.

Appellants requested the board of directors of the Board to institute a suit to have this Future Trading Act declared unconstitutional, but that request was refused, and the bill alleges that these directors intend to comply with the act because they fear to antagonize the public officials, whose duty it will be to construe and enforce it. (Rec., 14.)

ERRORS RELIED UPON.

That the District Court erred:

1. In not holding that the provision of the Act (Sec. 5 (e)), which requires the Board to admit to membership representatives of farmers' co-operative associations and to permit "patronage dividends," violates the Federal Constitution in that it deprives the Board, as well as its individual members, of their property without due process of law.

2. In not holding that those sections of the Act, which regulate boards of trade and their members and their actions and transactions and require memoranda, reports and records thereof (being Sec. 5 (b) (c) (d) (e) (f), Sec. 6, Sec. 9, and Sec. 10), violate the Constitution of the

United States in that thereby Congress attempts to regulate commerce which is wholly intrastate in character.

3. In not holding that part of the Act, which imposes a tax upon "puts" and "calls" (Sec. 3) and upon contracts for sales of future delivery when not made by or through a member of a board of trade which has become a contract market, or by a grower of grain, etc., (Sec. 4), violates the Constitution of the United States in that it is not within the power conferred on Congress to levy taxes.

4. In entering the decree dismissing the bill instead of a decree granting the relief prayed by the bill and adjudging said Future Trading Act unconstitutional in the particulars above stated and *in toto*.

ARGUMENT.

POINT I.

THE POWER TO IMPRESS PRIVATE PROPERTY WITH A PUBLIC USE.

All private property is held subject to the proper exercise of this power, and any statute, which is the exercise of this power, does not violate the Constitution by depriving the owner of his property without due process of law.

Munn v. People, 94 U. S. 113.

The question here is whether Sec. 5 (e) of The Future Trading Act can be sustained as a proper exercise of this power. This calls for a consideration of the origin and scope of this power.

The early common law divided business occupations and the properties used therein into two classes. One included those which were strictly private. In these the common law permitted the owners to sell, or refuse to sell, their property and their services in connection therewith as they pleased, and to charge therefor any price they saw fit. They could serve, or allow the use of their property to, one person, and refuse a like privilege to another for no reason whatsoever.

The other class comprised those occupations, in which owners had so used their property that the public acquired an interest therein to such an extent that such owners were not permitted either to discriminate between those desiring to share in the service rendered, or to make an unreasonable charge for such service. The common law placed on such owners the duty to serve all alike and at reasonable rates.

In this class were the local miller, the inn-keeper, the carrier (in that age a stage-owner), the owner of a wharf on a navigable water (wharfinger), etc.

As travel and transportation developed, it gave rise to railroads and other modern common carriers; but these were obliged to seek and obtain from the state special privileges, such as the right of eminent domain, and thereby they submitted themselves to a larger measure of governmental control than exists as respects the class now under consideration. Having once devoted their property to use as a railroad, these are not permitted to withdraw it from that public use. But even as respects this class the power to legislate has been confined to statutes which benefit the public at large.

(See *Mo. Pac. Rwy. v. Nebraska*, 164 U. S. 403, and other cases cited on pp. 20, 21 of this brief.)

It has never been held, even as respects these modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

Returning now to the second of the classes above named—as business life became more complex and the instrumentalities used therein became more enlarged and complicated, it became necessary that there should rest somewhere the power to impress other properties and their owners with a public use and thereby impose on them this duty of serving all alike and at reasonable rates.

The courts of the country are now agreed that this power is legislative and not judicial in character.

Express cases, 117 U. S. 29.

The American Live Stock Co. v. Live Stock Exchange, 143 Ill. 210.

Ladd v. S. C. P. & M. Co., 53 Texas 174.

The legislatures of the states were the first to exercise this power. Apparently the first of these statutes passed the Illinois Legislature in 1871. It undertook to fix the maximum rates of storage for the grain-mixing elevators of Chicago. That statute was attacked in this court—

Munn v. Illinois, 94 U. S. 113,

upon the ground that it violated the due process of law clause in the 14th Amendment of the Constitution, but this court upheld the statute as a proper exercise of the power to impress property with public use, or to regulate property, whose use by the owner had already impressed it with a public use.

Similar statutes were subsequently passed in New York and North Dakota, and these were sustained by this court on the same principle.

Budd v. New York, 143 U. S. 517.

Brass v. North Dakota, 153 U. S. 391.

Subsequently this court sustained as a proper exercise of this power a Kansas statute—which required insurance companies to charge reasonable rates—and amplified the doctrine by making the business, rather than the property used therein, the object to be impressed with a public use.

German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

All these statutes were alike in that the benefits they conferred accrued to the public generally and not to a mere class of the public, and their purpose was only to impose the rule requiring that all should be served alike and at reasonable rates.

None of them required the owners of the property or business to do more than permit all to share in the service rendered without discrimination and at reasonable rates. The foregoing is also true of the state statutes

involved in the numerous state decisions reviewed by this court in *Budd v. People*, *supra*.

Neither the inn-keeper, stage-owner, wharfinger, etc., under the common law, nor the grain elevator owner or insurance company under these statutes, was required to admit others to share in the ownership of the business or the instrumentality rendering the service or in the profit accruing to the owners therefrom. Thus in

Munn v. Illinois, 94 U. S. 133,

this court said:

“There is no attempt to compel these owners to grant to the public an interest in their property, but to declare their obligations, if they use it in this particular manner.”

The foregoing decisions of this court also make it clear that the power to impress property with a public use is, as respects a state, “an exercise of the police power of the state,” (*Budd v. New York*, 143 U. S. p. 545). And in

Lawton v. Steele, 152 U. S. 133-137,

when discussing the nature and extent of the police power, as exercised by a state statute providing for the destruction of fishing nets, this court said:

“To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference.”

It thus appears clear that in a proper case a state, in the exercise of its police power, may by statute impress property with a public use.

But the general police power resides only with the states. Congress may exercise such power only so far

as it is included in the other powers conferred on it by the Constitution.

Hamilton v. Kentucky Distilleries, 251 U. S. 146.

United States v. Cruikshank, 92 U. S. 542.

Tennessee v. Davis, 100 U. S. 257, 302.

If Congress has also this power to impress property with a public use, it must reside in its commerce power. But is that power broad enough for this? It is merely the power to "regulate" commerce.

Again, this power as respects any particular object must reside exclusively either in the state or in Congress; it cannot well reside in both without producing conflicting statutes.

Where the property is wholly within a state and the business, in which it is used, is mainly intrastate, the power to impress them with the public use ought, it would seem, to belong exclusively to the state.

If so, the Future Trading Act is not the exercise of the power to impress the Board of Trade and its property with a public use; for the Board transacts no business, its property is in Illinois, it is used by the Board only to provide a meeting place for traders, offices for its own use, and space to sub-let to others; practically all who make trades in its exchange room are residents within that state; all the trading for future delivery—which constitutes the major part of the trading in the exchange room—is intrastate commerce, as is pointed out on pages 34-43 of this brief; the selling on commission by members in the exchange room of grain consigned to them by the owners is, as respects the service they render, not interstate commerce; (*Hopkins v. United States*, 171 U. S. 587); the buying of grain by members on a commission basis is of the same character; much of the buying and selling for immediate delivery upon the exchange is

necessarily between principals, who reside in Illinois, and relate to grain, which has never been out of Illinois; while most of the buying and selling of grain by members of the exchange for deferred shipments to or from Chicago is not made in the exchange room but by letters or telegrams between the offices of such members and the other parties to the purchases or sales.

In short, the property of the Board is situate in Illinois, the Board itself transacts no business upon its property, and the business that the Board permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it would seem that the power to impress this property and business with a public use ought to belong to the State of Illinois alone.

The further discussion, or the decision, of this question, may perhaps be unnecessary because, assuming that this power is a part of the commerce power of Congress, this provision of the Future Trading Act, which forces representatives of farmers co-operative associations into membership in the exchanges, is in no sense a proper exercise of the power.

It is not for the benefit of the public generally but only of a certain class—farmers' organizations. Associations of millers, exporters, etc., are not given the right to force their members into the exchanges.

This exchange, its rules and by-laws, its exchange room and its members, should be considered jointly as constituting a local instrumentality of trade capable of rendering a service in the purchase and sale of grain, for which others are willing to pay. It is therefore not to be distinguished in character from privately owned grain-elevators, inns, stage-coaches, etc. In all cases the property involved is privately owned, and the only interest therein

that a statute may grant to the public (without paying for the property) is an interest in the use of the property, or, in other words, the right of all to share in the service it renders on fair and common terms.

But The Future Trading Act does not undertake to compel the one thing that the common law and these statutes authorize. Its purpose is not to get for all producers of grain the right to have their grain sold on the exchange. They already have that. Nor is its purpose to better the service, which the exchanges render, or to effect a change in the present rates of commission, which non-members must pay to their agents on the exchange for the sale or purchase of grain there.

There is no claim that the rates now charged are not as low as they can be, nor that the service furnished by these instrumentalities is not efficient.

What the Future Trading Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers, who join co-operative associations, may escape the payment of the commissions—which all others must pay—and thereby share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years, (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property—and the profit accruing from its use—like the grain elevator or insurance company, and the profit therefrom belong to those who have created and own it, and nothing short of the exercise of eminent domain can impair or deprive such owners of that property or of their profit from its use.

Thus the power to impress property with a public use should not protect Section 5 (e) of this Act from the

application to it of the due process clause of the 5th Amendment.

II.

THE PROVISION OF THE ACT (SEC. 5 (E)) REQUIRING THE EXCHANGE TO ADMIT TO MEMBERSHIP ANY DULY AUTHORIZED REPRESENTATIVE OF A CO-OPERATIVE ASSOCIATION OF PRODUCERS, AND SANCTIONING "PATRONAGE DIVIDENDS," DEPRIVES THE BOARD OF TRADE AND ITS MEMBERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration,—violates the due process clause of the 5th and 14th amendments to the Constitution.

Mo. Pacific Rwy. Co. v. Nebraska, 164 U. S. 403.

Missouri Ry. v. Nebraska, 217 U. S. 196.

Chi., M. & S. P. R. R. v. Wisconsin, 238 U. S. 491.

Eubank v. Richmond, 226 U. S. 137.

Cole v. La Grange, 113 U. S. 1.

The first of these cases has many points of similarity to the case at bar. Farmers of a certain county in Nebraska (Farmers' Alliance No. 365) had associated themselves together for the same purpose as sought by Sec. 5 of The Future Trading Act—to market their crops at cost—by constructing and operating a local elevator for their joint benefit. The statute of Nebraska prohibited railroads from giving any preference or advantage to, or subjecting to any prejudice or disadvantage, any person or locality, or any particular description of traffic in any respect whatever.

The railroad company had already leased to two private persons sites upon its rights of way for the construction of local elevators at that point, and this as-

sociation of farmers claimed that the refusal of the railroad company to permit them also to construct an elevator on its right of way violated the foregoing statute, and the State Supreme Court so held. But this court held that "was in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners," and that this was not due process of law.

The 5th amendment applies to an intangible right as well as to tangible property.

Monongahela Co. v. United States, 148 U. S. 312, 343.

Oklahoma v. Kansas Nat. Gas. Co., 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking within the due-process-of-law provision as the actual appropriation of it.

Peabody v. U. S., 231 U. S. 530.

Filor v. U. S., 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision.

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

Buchanan v. Warley, 245 U. S. 60, 74.

A statute, therefore, which, like the one at bar, compels an unwilling owner to admit others into a right to enter upon and use his property, violates the due-process-of-law provision, unless there is a taking for public use—in which case compensation must be made.

To apply these principles to the case at bar: This Board was by special charter created by the State of Illinois a *private* corporation with power to acquire and hold property. Originally this right was limited to \$200,000 worth of property. By subsequent statute this limitation was removed. For more than sixty years the members of this Board have annually paid assessments or dues sufficient to meet the current expenses and create a large surplus, which is now represented by an exchange building in Chicago of the value (above a mortgage) of more than \$2,000,000. This property is just as much privately owned as is any office building or private residence.

It is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes.

This Board, acting under a power expressly given it by its charter, has for sixty years confined access to and use of, a part of this property—its exchange hall—to such persons, as in the exercise of their discretion its board of directors should deem to be fit persons to there make contracts with other members. *Indeed, the basic right inuring from membership in this association is the right to enter this exchange hall and there trade.*

Many efforts have been made to get the Illinois courts to interfere with, and control, the exercise of this discretion and determine who should be its members, but always without success.

Board of Trade v. Nelson, 162 Ill. 431, 438.

People v. Board of Trade, 80 Ill. 134.

In one case involving a similar exchange (*American Live Stock Co. v. Live Stock Exchange*, 143 Ill. 210), the Illinois Supreme Court expressly held that the courts

were without power to compel the exchange to accept any person as a member.

The reason for this attitude of the courts is well expressed in

McCarthy Bros. v. Minneapolis Chamber of Commerce, 105 Minn. 497,

as follows:

“The reasons why the rule and regulations with reference to the acquisition of membership must be given full force and effect lie on the surface. The business transacted by such organizations and the methods pursued are unusual and special. The members do not deal at arms’ length to the same extent as under ordinary circumstances. An unusual degree of confidence is imposed by each member in his fellow members, not because human nature is more trustful and confiding in the Chamber of Commerce than elsewhere in the marts of trade, but because the business is transacted under unusual self-imposed restrictions and with extraordinary provisions for enforcing verbal agreements and understandings which possibly may not be enforceable in the courts.”

This Board has also thought it advisable (Rec., 4) not to permit any corporation to become a member; but it allows a corporation to make trades upon its exchange, if two of its executive officers and substantial stockholders are members, and it makes these two members subject to discipline for failure of their corporation to comply with its business obligations.

By The Future Trading Act farmers’ associations may participate in the trading by having *one* representative admitted to membership.

Sec. 5 (e) compels this Board to admit to its exchange room—and the privilege of trading there with other members—*any* duly authorized representative of a co-operative farmers’ association (which, of course, means that *all* such representatives must be admitted), provided only

that the association—not the representative—has adequate financial responsibility. The representative need not be a fit person, if his association has sufficient financial responsibility.

Thus, the right which every exchange has—and must have in order to function properly—to admit into its exchange room and trading privileges only such persons as, in the judgment of its officials, are in point of character, business integrity and financial standing, fit persons to join in the trading, is, by this act, destroyed in favor of a certain class—farmers' organizations and their representatives.

The proper exercise of this discretion by the directors is of great importance to all trading members, because the first member to accept a bid in the "pits" gets the trade, and trades for very large amounts are made oftentimes in an excited and noisy market by mere word of mouth, and no opportunity is afforded to ascertain, before the making of the trade, the present financial responsibility of the trader. The rules requiring margins often afford inadequate protection when the markets are excited and the fluctuations are sudden and large.

Thus, the principal protection to traders is the character of the trader and the assurance—which the character of the trader only can give—that he will not go beyond his financial depth.

This act deprives the exchange and its members of the present right to have its directors determine whether any applicant has the requisite character and financial responsibility. As respects farmers' associations, the Secretary of Agriculture is made the final judge of this. If the exchange should refuse to admit a representative of a farmers' association, which he—disagreeing with the directors—thinks has sufficient financial responsibility, he may direct the admission of the applicant, and if this

is refused, he may deprive the exchange of its designation as a "contract market."

Thus this exchange is, by this Future Trading Act, expressly deprived of its present charter right to say who may enter its privately owned exchange room and there enjoy the privilege of trading.

If the State of Illinois has the power to establish and maintain public markets, it might under its right of eminent domain take this exchange building and make it a public market and then admit to the trading privileges there such persons as it thought fit.

It may be also, if this trading on this exchange were interstate commerce, that Congress might also acquire this exchange building and make it a public market, to which all might resort under such restrictions as Congress might see fit to impose; but such act by Congress or the state could only be upon the payment of adequate compensation.

This Future Trading Act does not contemplate such a taking; nor does it seek to make these grain exchanges *public* markets. For a market—to be public—must be one to which all classes of traders may resort. This act gives the right of access only to a particular class—co-operative associations of farmers, who are only on the selling side of the market. They who are on the buying side of the market—the exporters, millers and consumers—are not given the right to form associations and have their representatives admitted to membership under an immunity from compliance with the commission rule of the exchange.

The question, therefore, is whether Congress may, without violating the Fifth Amendment to the Constitution, compel the admission to membership in the exchange of persons, who otherwise would not be acceptable as mem-

bers, and this without payment of any compensation whatever to the exchange or its members.

This question is not to be confined to the power as exercised by this act. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (*Brown v. State of Maryland*, 12 Wheat. 439.) If the power exists at all, it authorizes Congress to compel the admission to membership of *all* persons now pecuniarily disadvantaged by not being members. If farmers may organize, and through a representative get admittance to this exchange and there sell all their grain through the exchanges *at cost*, Congress may also force into the exchanges representatives of associations of millers, exporters, etc., who may also wish to enjoy the facilities, which the exchange provides, for the purpose of *buying* at cost.

While the extent of the impairment of the property right is not here a vital question, we cannot refrain from here pointing out the injurious results of such legislation, and thereby bringing to the attention of the court more fully the nature of the right which this Act impairs.

The exchange itself transacts no commercial business. It neither buys nor sells. It is not an organization for profit. It neither contemplates, nor has ever declared, any dividends. It is merely an instrumentality by means of which its members join in providing and maintaining an exchange hall where they may meet to trade as individuals, and by means of which they may determine who are fit persons to share these trading privileges and they may promulgate rules to control their business relations and to fix the terms of, and to enforce, the contracts which they make with one another, and to settle the business disputes arising therefrom.

Its principal source of revenue is the yearly assessments of its members, which now produce \$240,000 a year.

Hence the exchange must make it profitable for a sufficient number of persons to become and remain members; and this can be done only by making the value of the benefit that the membership confers upon the member exceed his share of the expense of maintaining the exchange. If the members find no profit or advantage in trading, a membership will have little,—and if any, only a sentimental—value, which would not be enough to induce members to pay the large assessment necessary to meet the expense of maintaining the exchange.

There are several ways, in which an exchange makes the privilege of membership valuable enough to attract members. It maintains an exchange hall, where the making of trades is convenient and economical. It confines trading there to those who are members, thus making it necessary for non-members to employ members as agents, if they desire to share in the trading. But, if Congress or a state may compel the exchange to give access to the salaried agents of all those, who would otherwise employ members to make trades on a commission basis, the business of making trades for others on a commission—which comprises a substantial part of the business of the members of an exchange—will be destroyed or seriously impaired, and it would no longer be profitable for that class of members to remain members.

But it is not enough for an exchange merely to confine trading to its own members and thereby enable them to profit by acting as agents for non-members. To function properly, it is necessary that it should attract and retain members of the right character and credit.

One of the things essential to the successful maintenance of an exchange is its disciplinary power over its members. It must compel them to abide by their con-

tracts, and otherwise maintain a high standard of business integrity. An exchange can do this only by the exercise of its disciplinary power to expel or suspend members, who are guilty of uncommercial conduct, or default on their contracts. But the fear of suspension or expulsion loses much of its deterrent influence when the privilege of remaining a member becomes of little value. Hence, all exchanges have found it necessary to give value to the privileges of the membership by prescribing minimum rates of commission to be charged by members when acting as agents for others.

This the courts recognize as a legitimate function of the exchange. The Illinois courts have held valid the minimum commission rule of the Chicago Board.

Board of Trade v. Dickinson, 114 Ill. App. 295.

The courts of other states concur in this view.

State v. Duluth Board of Trade, 107 Minn. 506.

To render this commission rule effective, it is necessary to prohibit—as this Board does (Rec., 5)—members from directly or indirectly rebating to their principals any part of their commissions.

It is alleged in the bill—and admitted—that this commission rule has materially added to the value of memberships on this Board. (Rec., 6.)

This Future Trading Act entirely nullifies this commission rule as respects these farmers' organizations, as is more fully explained in the Statement of this brief at page 8. It permits the farmers of a state, or of a wider territory, to join one association, designate one of its salaried officers as its representative, have him admitted to the exchange, and by the means of the "patronage dividends" have all their grain sold there *at cost*.

And this is no idle fear or remote contingency. For

it is alleged in the bill—and admitted—that, in addition to a large number of existing farmers' co-operative companies, an organization has recently been formed and is functioning—the “U. S. Grain Growers, Inc.”—which proposes to avail itself of this law to market the grain of all farmers at cost by resorting to these “patronage dividends.” (See the elaborate contracts through which this is being accomplished, which are set out at pages 22 to 40 of the record.)

Thus, the present act impairs—and the full exercise of the power claimed for Congress would completely destroy—the right of this exchange, not only to retain sufficient members to derive the income necessary to meet its expenses, but would also impair the disciplinary power of the exchanges over their members.

It therefore seems clear that Sec. 5 (e) of the Act violates the 5th Amendment of the Constitution, and that the protection of his amendment is available, not only to the Board itself, but also to its members, who are the beneficial owners of the exchange building and of the facilities which the exchange provides.

There is still another aspect of this question. Each of these 1,610 privileges of membership in this Board is a valuable right—a species of property—which is now worth about \$7,000. It has a saleable value because an incoming member may tender the transfer of a membership of an outgoing member in lieu of his initiation fee. This court has held memberships in some exchanges to be assets in bankrutpey.

Hyde v. Woods, 94 U. S. 523.

Page v. Edmunds, 187 U. S. 596.

This valuable right belongs to the individual member and he may sue to protect it, especially where the Board refuses to do so. (*Dodge v. Woolsey*, 18 How. 331.)

Furthermore, the relationship between the members and the Board (Rec., 4) gives rise to an obligation of the exchange to abide by its rules. (*Ryan v. Cudahy*, 157 Ill. 108.)

One rule provides that no person shall be admitted to membership unless 10 of the 18 directors shall regard him of good character and credit. Doubtless this rule must yield to a valid statute, but not to one which is unconstitutional—as is the present Act. As the Board and its directors propose to comply with this Act and admit to membership representatives of farmers' associations in utter disregard of this rule, the individual members have the right to compel by injunction their compliance with the foregoing rule. This in itself constitutes a sufficient basis for this suit.

Again members may as individuals maintain this suit because, if this Act succeeds in permitting the members of farmers' organizations to market their crops at cost through the exchange, it will—as alleged in the bill and admitted (Rec., 7)—in time destroy the business of the many members who now receive grain on consignment and sell it on commission, and ultimately much impair, if not wholly destroy, the value of all memberships, which are the property of the individual members.

The federal court at Kansas City (Circuit Judge Stone, District Judges Pollock and Munger), recently issued a temporary injunction restraining enforcement by the Attorney General of a statute of Missouri, which—like section 5 (e)—compelled the grain exchanges of that state to admit to membership representatives of farmers' co-operative associations. No opinion was filed.

It is, therefore, respectfully submitted that Sec. 5 (e) of this Act violates the 5th Amendment to the Constitution.

III.

THE PROVISIONS OF THE ACT WHICH AIM TO REGULATE BOARDS OF TRADE ARE NOT WITHIN THE COMMERCE POWER OF CONGRESS.

According to its title the Act is one (1) to tax certain transactions, and (2) to regulate boards of trade.

Thus this statute differs from some, which have come under review by this court, and which on their faces appear to be merely an exercise of the power to levy taxes. In such cases this court has felt itself deterred from going behind the profession of the statute to infer an ulterior motive in Congress.

Here this court is under no such restraint. Congress by the title has said that parts of this Act are not the exercise of the taxing power, and has left this court free to treat as the exercise of the commerce power those provisions of the Act, which are clearly regulatory in character. Such are

1. The provision of Sec. 4 (b) which requires *members* of a board of trade to evidence each contract for future delivery by a written memoranda showing, "the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery," and requires that such memoranda be kept for a certain time and be open to the inspection of the Departments of Agriculture and Justice.

As the Act does not contemplate the payment of a tax by such members this clause is clearly one of the regulating provisions of the Act.

2. The provisions of Sec. 5 (b), which requires (a) the Board to provide by its rules (there is no other way of providing) for the making and filing, either by the Board or its members, as the Secretary may direct, of *reports*

in the form and at the times prescribed by him "showing the details and terms of all transactions entered into by the board or the members thereof," and (b) also the keeping of permanent *records*, either by the board or its members, as the Secretary of Agriculture may direct, showing the details and terms of all such contracts, the parties thereto, the assignments and transfers thereof, and the manner in which said transactions are fulfilled. Such records are required to be preserved for a certain time, and to be open to the inspection of the Department of Agriculture and the Department of Justice. This even authorizes the Secretary of Agriculture to compel this Board itself to make reports and keep records of the transactions of its members.

The foregoing provisions relate to transactions, which are not taxed by the Act and are, therefore, clearly some of the regulating provisions of the Act.

3. That provision of the Act, Sec. 5 (e) which requires the Board to admit to membership all duly authorized representatives of co-operative associations of producers, and nullifies the commission rule of the exchange as respects such representatives. The transactions of these new members are not taxed and this provision is purely regulatory.

4. That provision of the Act which requires the Board to make effective (by suspending or expelling the member) any order, which the Secretary of Agriculture may make under Sec. 6 (b), directing the boards of trade to refuse all trading privileges to any person—whether member or not—who shall, in the opinion of the Secretary, violate any of the provisions of the Act.

5. Sec. 5 (c) (d), requiring the Board to prevent the dissemination by the Board or any of its members, of false reports that may tend to affect the price of grain,

and also requiring the exchange to provide for the prevention of manipulation and "corners."

6. Section 9 of the act which provides for the investigation of boards of trade by the Secretary of Agriculture.

As the Act does not impose any tax upon a board of trade, or its members, all the foregoing provisions requiring action by the board of trade, or authorizing investigations by the Secretary of Agriculture, are clearly regulatory in character.

Hence the question here is, whether any of the objects of these regulating provisions are sufficiently interstate in character to be embraced within the power of Congress.

First. Is that provision of Sec. 5 (e) which modifies the commission rule of the exchange in the interest of co-operative associations of producers—which in effect prescribes what certain members of the exchanges may charge their principals for selling grain—within this commerce power?

That question is answered in the negative in

Hopkins v. United States, 171 U. S. 578, where this court held that a rule of a live stock exchange, which prescribed the rates of commission, did not invade the field of interstate commerce, saying:

"The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city. * * *

"On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce."

Second. Let us next consider such of the above regulations as relate to contracts for the sale of grain for future delivery. The bill (Rec., 7-11) describes the character of future trading on this exchange, as follows:

"Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Board has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a 'pit,' where its members may conveniently, and do daily, gather and make such contracts with each other by open *viva voce* bidding; and respecting such trading the rules of said Board have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market upon its exchange room and only during the hours of regular trading; and said rules also provide that no trade or contract for future delivery shall be made or offered to be made by any member of said Board, except between 9:30 a. m. and 1:15 p. m., except on Saturday, when the trading must close at 12 o'clock M., by reason whereof all such trading in grain for future delivery by members of said Board is in fact confined to said Exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Board requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Board, and that the contract shall be made with the member first accepting said offer.

"That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Board make valid for delivery; that a rule of said Board now and for many years in force [see Rec. p. 20], provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Board, and have been by the Board of Directors declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of the Board of Directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said Board of Directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state [Ill. Rev. St. Ch. 114, Sec. 139, 140, 148] * * * which said Act provides that it shall be the duty of every warehouseman of Class 'A' to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the same grade received about the same time as the date of said receipt; and by said Act it is further provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of

said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a 'separate bin,' and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class 'A' in a special bin, and if so stored the warehouse receipts issued for such grain are not, and never have been, deliverable upon said contracts of future delivery made by members of said Board; nor has said Board ever declared a regular elevator under said rule any warehouse which has not been licensed under said statute to conduct a warehouse of Class 'A.' * * *

"That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago upon cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class A, it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

"That in this trading for future delivery on the exchange of said Board during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the 'ringing' system which is provided for by the rules of said Board; and that practically all said remaining future contracts are performed or completed during the

month specified for delivery by the delivery by sellers to buyers of warehouse receipts of public warehouses of Class 'A' which warehouses have been made regular under the said rules of said Board.

"That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contract, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete; and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said Board of Directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload lots actually delivered under the provisions of this rule on contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even a very small percentage of the total quantity of grain actually delivered upon said contracts; and that, while said rule also authorizes said Board of Directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Board and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said Board of Directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Board, said Board has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class 'A' warehouses declared regular by said Board of Trade is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of

time, and that at the present time said Board of Directors of said Board have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator." (This future trading on this exchange was before this court in *Board of Trade v. Christie*, 198 U. S. 236.)

Thus, all contracts for future delivery of grain made by or through members of this Board are made in its exchange room in Chicago during certain market hours only, and the only parties to these contracts are members then and there present.

Less than one-quarter in volume of these contracts are performed by delivery, and upon such contracts the delivery is of warehouse receipts entitling the holders to receive a specified number of bushels of grain of a particular grade out of a larger common mass in store. These receipts on their face state that the grain, for which they are issued, has been mixed with other grain of the same grade; and when the receipt holder calls for his grain the warehouseman, to comply with the state law, makes delivery out of the grain *that has been longest in store*. If any component parts of the common mass of grain, out of which the receipt is filled, have come from other states, they have completely lost their interstate character by this inter-mixing.

Are such contracts for the future delivery of grain interstate commerce? This question seems fully answered in the negative by this court in the case of

Ware & Leland v. Mobile County, 209 U. S. 405, where a statute of Alabama imposing a tax upon correspondents in Alabama of members of the New York

Cotton Exchange and Chicago Board of Trade was upheld, because the only business of these correspondents was to receive in Alabama orders from residents of that state, to be transmitted by wire to the brokers at the exchange cities, who executed the orders by making upon the exchange the required contracts with other members there present. This court stated:

"The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. * * * For that part of the transactions, merely speculative, and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in the foreign state the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of pur-

chase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

This court treated that case as involving only contracts for the future delivery of bales of cotton, which do not lose their identity by being mixed or stored in a common mass with other cotton of like grade. The case at bar, therefore, is much stronger because all grain shipped from other states, which is carried into this future trading on the Chicago Board, does completely lose its identity when stored in Chicago elevators, and long before it is in any way connected with this future trading.

The *Ware & Leland* case is cited with approval in

Engel v. O'Malley, 219 U. S. 139.

N. Y. Life Ins. Co. v. Deer Lodge Co., 231 U. S. 496, 511.

Other decisions of this court support the principle of the *Ware* case. Thus in

Hopkins v. United States, 171 U. S. 578

(more fully cited on page . . . of this brief,) it was held that the business of selling live stock on an exchange by members thereof, who were acting as agents for the owners, was not interstate commerce.

Brown v. Maryland, 12 Wheaton, 419.

(the first expression of the original package doctrine) where this court held that the property lost its distinctive character as an import, and also its interstate character if, after being brought into a state, it has "become incorporated and mixed up with the mass of property in the country"; and that doctrine has been applied so as to cause all property brought from one state to another to lose its interstate character in the following cases:

Where a box or case is brought into a state contain-

ing many smaller packages or bottles and these smaller packages or bottles are removed from the case for sale.

May v. New Orleans, 178 U. S. 496.

Austin v. Tennessee, 179 U. S. 343.

Purity Extract Co. v. Lynch, 226 U. S. 192.

Weigle v. Curtice Bros. Co., 248 U. S. 285.

When natural gas is piped from one state to another and there distributed by a local company through its local pipes.

Public Utilities Co. v. Landon, 249 U. S. 236.

When moving picture films are brought from other states and unrolled and exhibited to audiences.

Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S. 230.

When gasoline is brought into a state in tank cars, from which it is sold in quantities to suit purchasers.

Askren v. Continental Oil Co., 252 U. S. 444.

Now let us consider the grain purchased through this future trading by persons who contemplate *shipping* it beyond the state.

Contracts which by their terms contemplate the shipment of grain across state lines are, of course, interstate commerce. But the purpose or intention of some of the purchasers in this future trading upon this exchange to ship out of the state property they purchase does not make their contracts for future delivery made in these "pits" interstate contracts. And if one such contract is not, a large number of such contracts do not constitute, interstate commerce.

United States v. E. C. Knight Co., 156 U. S. 1, 13.

Coe v. Errol, 116 U. S. 517.

New York Central v. Mohney, 252 U. S. 152.

Arkadelphia Co. v. St. Louis Ry. Co., 249 U. S. 134, 151.

Bacon v. Illinois, 227 U. S. 504, 516.

Merchants Exchange v. Missouri, 248 U. S. 365.

Hammer v. Dagenhart, 247 U. S. 251.

Crescent Oil Co. v. State of Mississippi, decided by this court November 14, 1921.

In the *Arkadelphia case*, *supra*, the fact that as to 95 percent of the products the parties must have contemplated shipment out of the state was held immaterial. In the *Merchants Exchange case*, *supra*, it was held that a state statute requiring that all grain should be weighed by state officials did not burden interstate commerce, although the grain in large part was shipped in or out of the state.

It has been urged in the North Dakota case now pending before this court that the foregoing rule should not apply where 90 per cent of the grain raised in North Dakota is purchased by persons who intend to ship it out of the state. If this view shall prevail, it will not take the case at bar out of the general rule above stated, because in more than three-quarters in volume of this future trading, the parties do not make deliveries, and therefore do not contemplate shipments out of the state; and undoubtedly in a substantial part of the balance of those contracts (upon which deliveries do take place) the grain is purchased by or for Illinois millers by speculators who sell the warehouse receipts again, by local warehousemen who purchase the grain to keep it earning storage in their elevators, by local investors who buy "cash" grain and sell it for forward delivery with a view of making a profit out of the prevailing carrying charges, etc.—thus leaving an indefinite but small percentage of this future trading, in which the purchasers buy intending to ship out of the state.

All this future trading, therefore, should be regarded as

intrastate commerce, the regulation of which is not within the commerce power of Congress.

This would nullify, because violative of the Federal Constitution—at least as respects this Board—(1) so much of Sec. 4 (b) as requires members of a board of trade to make and keep memoranda of their sales for future delivery, and exposes such memoranda to the Department of Agriculture or Department of Justice; (2) also so much of Sec. 5 (b) as requires a board of trade to provide for the making, filing and keeping for three years, either by it or its members, of reports and records of all contracts for future delivery, and gives the Secretary of Agriculture and Department of Justice access thereto, and (3) also Sec. 5 (f) so far as it makes obligatory on a board of trade to make effective the orders of the Secretary of Agriculture by depriving persons violating the act of the privilege of making future contracts, (4) also Sec. 9 so far as it authorizes the Secretary of Agriculture to investigate future trading on boards of trade.

Third. Let us consider together the other regulatory provisions of the Act above referred to, which require—Sec. 5 (e)—boards of trade to admit to membership representatives of farmers' organizations and permit "patronage dividends," and require—Sec. 5 (b)—boards of trade to provide that reports and records be made and kept of *cash* transactions, and to prevent false reports affecting prices, or the manipulation or cornering of grain, (Sec. 5 (c) and (d)) and which provide (Section 9) for the investigation by the Secretary of Agriculture of boards of trade as respects their cash transactions.

This presents the question whether what this Board does is interstate commerce, or is merely an aid or facility to commerce, and as such beyond the power of Congress.

We have here a non-profit corporation created by a

state, which does no business itself and whose chief function is to furnish in Chicago an exchange hall where its members individually may conveniently and economically transact business. To that end it provides for the admission as members of only such persons as seem to it to be fit in point of character and financial responsibility, it provides a method by which members, who default on their contracts or otherwise misbehave, may be suspended or expelled, it provides rules respecting the terms of the contracts made by its members in the absence of express stipulations to the contrary, it provides arbitration committees to decide the business disputes of its members, and it promulgates and enforces rules to control the business relations of its members to each other and to the exchange itself.

Should not all these be treated as together constituting an instrumentality, which is but an aid to commerce?

Much the larger part of the trading between members in the exchange hall is so-called future trading, which, as already shown, is not interstate commerce. Another substantial part of the trading in the exchange hall is that of members who, as agents, receive grain on consignment to sell and account for the proceeds or buy grain as agents—which, so far as the business of these agents is concerned, has been held by this court not to be interstate commerce. The bidding for, or offering, grain by letters or telegrams sent by members is in no sense a part of the trading on the exchange. Hence, if any, only a minor part of the total volume of trading on this exchange possesses any of the characteristics of interstate commerce.

From the foregoing facts does not the conclusion arise that the maintaining of this exchange hall—and everything that the Board does in connection therewith—lacks any element of interstate commerce within the definition

that this court has frequently given to that term? Hence, is not Congress without power to regulate this exchange.

Such seems to have been the practical construction of state and federal legislators for more than one hundred years prior to the passage of this Future Trading Act.

The stock brokers organized what is now the New York Stock Exchange as early as 1792, and it became a formal organization in 1817. For many years there have existed in some states, stock, grain, cotton and coffee exchanges. The Chicago Board of Trade was first organized as a voluntary association in 1848.

During all this time the states, in which these exchanges have been located, have enacted numerous laws calculated to suppress or minimize the abuses, which these exchanges inevitably give rise to. Illinois at first prohibited "puts" and "calls" (*Booth v. Illinois*, 184 U. S. 425), but later permitted these contracts when not used for gambling purposes. Illinois R. S., Ch. 38, Sec. 130. See *Brodnax v. Missouri*, 219 U. S. 285.

During all this time Congress has passed no statute to regulate, under its commerce power, these exchanges. It has imposed a prohibitive tax upon such contracts for the sale of cotton as contain certain objectionable terms, but this statute does not seem to be harmful enough to have invited a contest upon its constitutionality.

In 1892, a bill was introduced in Congress to suppress future trading on the grain exchanges through an exercise of the taxing power, but this bill was defeated. (See page 58 of this brief.)

Hopkins v. United States, 171 U. S., 578. seems to support the view here urged. There the business of members of a live stock exchange, who were engaged in receiving from other states cattle to be sold by them on the exchange for the account of their principals,

was held not with the Sherman Anti-trust Act, because it was not interstate commerce, but a mere aid or facility to commerce. The agent in selling the cattle for their owner simply aided him in finding a market. This court said:

“They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature. * * *

We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made.”

This being so, how can a corporation, which merely furnishes to traders a *hall*, where they may do this trading, be deemed engaged in interstate commerce? Surely the exchange, which furnishes a hall for the trading, is much farther removed from the trading than are the members who occupy this hall and actually participate as agents in the trading there.

Nathan v. Louisiana, 8 How. 73, 80, where, it was held that a broker, who only bought and sold foreign exchange, was not engaged in interstate commerce, but only “in supplying an instrument of commerce” like a shipbuilder.

The Board of Trade, in furnishing a building where traders meet to make contracts—only a small portion of which relate to grain which has, before the sale on the exchange is made, come across state lines, or is to go across state lines after it reaches the purchaser on the

exchange—seems to have no more connection with interstate commerce than have the owners of the grain-mixing warehouses of Chicago, which store much grain that has come from, or is to go to, other states. Yet it has never been thought that these public warehouses are a part of interstate commerce or anything more than an aid thereto. Indeed, this court in

Munn v. Illinois, 94 U.S. at p. 135,
held these elevators not to be a part of interstate commerce, saying:

“The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.”

This is approved in

Covington v. Kentucky, 154 U. S. 213.

Other decisions supporting this view are:

Budd v. New York, 143 U. S. 517-545,

where a statute of New York prescribing the charges for passing grain through floating and stationary elevators was enforced against one operating a floating elevator,

through which grain was transferred from one vessel to another, and this court held that this instrumentality was not a part of interstate commerce, saying: (page 545.)

“It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws.”

This court has also held that:

“The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse.”

Paul v. Virginia, 8 Wall. 168.

Hooper v. California, 155 U. S. 648.

N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389.

Again in

Merchants Exchange v. Missouri, 248 U. S. 365, this court held that the board of trade in Saint Louis, in maintaining a bureau for weighing, and in granting weight certificates, and in making charges therefor respecting grain received from, or shipped to, points without the State, was not engaged in interstate commerce, and that a State statute, which displaced such bureau, was not an interference with that commerce. In

Brodnax v. Missouri, 219 U. S. 285,

the officers of the Kansas City Board of Trade were indicted under a state statute, which made it unlawful for any person or corporation to keep or cause to be kept within the state any *place*, wherein is permitted the buying and selling for future delivery of grain, etc., on margins when the seller does not cause to be made at the time of sale a complete record of the transaction and affix a stamp thereto. The only place kept by the defendants

was the exchange hall. In overruling the contention that the statute violated the commerce provision of the Constitution, this court said:

"All that the defendant offered to show in this connection was that a substantial part of the sales referred to were of grain * * * which were at the time of sale in course of transportation as articles of interstate commerce. * * * We add that the indictment deals with the *place* where sales, such as the statute describes, are made, and the offense is complete under the statute, by the keeping of such a place, and that occurs before any question of interstate commerce could arise, so far as this record discloses."

Thus in that case this court seems to hold that statutes relative to the keeping of the place—the exchange room—are exclusively within the police power of the states.

The following cases also support the above contention:

House v. Mayes, 219 U. S. 270.

Pittsburgh Co. v. Louisiana, 156 U. S. 590.

Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436.

Williams v. Fears, 179 U. S. 270.

Cargill Co. v. Minnesota, 180 U. S. 452, 470.

Ficklen v. Shelby Co., 145 U. S. 1.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394.

It is not here claimed that, if elevator or board of trade does some act, which prejudicially touches, or will interfere with interstate commerce—as was claimed of a rule of this Board in *Board of Trade v. United States*, 246 U. S. 231, or if members of an exchange conspire to run a corner "*affecting the entire trade of the country*" in a particular commodity, as in *United States v. Patten*, 226 U. S. 525,—Congress may not, as to such encroachments, enact a prohibiting act.

All that we do contend is that—considering together

this Board of Trade and all its activities—the general regulation thereof as respects admissions to membership, commission rates, what, if any, memoranda of contracts should be made, etc., should be held to be a part of intra-state commerce, and within the exclusive power of the state.

As stated in

Hammer v. Dagenhart, 247 U. S. 251, 273, 275,

“The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the ~~the~~ supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution. * * *

The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.”

It is therefore submitted that, at least as respects all the regulatory features of this Act referred to on pages 31-33 of this brief, this Act is, as respects this Board, and unconstitutional invasion of the rights of the state to regulate its internal commerce, and it should be adjudged to that extent invalid, unless the Act can, in these particulars, be held to be a proper exercise of the power of Congress to impose taxes.

IV.

THE POWER TO TAX.

It may be helpful here to refer to a few considerations—which in this court have become mere truisms—concerning the original purposes, which the framers of our Constitution had in view in adopting that instrument.

When the states through their representatives convened to frame a constitution, one consolidated govern-

ment of all the states was not their purpose. The states were already organized under governments, which possessed sovereign powers and were competent to regulate their entire internal policy.

The differences in institutions and interests of these different communities made it impracticable to adopt a consolidated government having control of all internal affairs. What the convention sought to do was to single out certain governmental functions, which could not be fully exercised separately by the individual states and to lodge these in a central authority capable of acting for the whole. This contemplated the surrender only of the common interest to a common control, leaving each individual state to shape its own internal policy and therein work out its own destiny in its own way. To this end, the Constitution *enumerated* all the powers intended to be bestowed upon the Federal Government.

When the draft of the Constitution was submitted to the several states for their approval, it met a storm of opposition arising out of the fear that the proposed Constitution would deprive each state of its right to regulate its own internal affairs. To meet this the responsible proponents of the Constitution gave assurances,—without which the Constitution could not have been ratified—that immediately upon its adoption, amendments thereto would be made expressly safeguarding the right of the several states to legislate exclusively on subjects purely intra-state; and this assurance was made good by the adoption of the 10th Amendment declaring that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.”

Thus the Federal Government became one of delegated powers, by which is meant that each of such powers is bestowed for a certain purpose and may not be ex-

exercised except for such purpose. Thus every power granted by the Constitution, whether express or implied, may only be exercised for the *purpose*, for which it was granted. If this were not so, there would be no limitation whatever upon its exercise; it becomes a mere arbitrary power; and none the less arbitrary where Congress, under the pretext of the exercise of one power that it has, undertakes to exercise a power that it has not.

These principles this court proclaimed in

McCulloch v. Maryland, 4 Wheaton 315, 420, 421.

Speaking through Chief Justice Marshall, it said (the italics being ours):

“*Let the end be legitimate*, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.
* * * Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or *should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government*; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.” In

Legal Tender cases, 12 Wall. 535,

this court, in re-stating this principle, added, “there must be some relation between the means and the end; some adaptiveness or appropriateness of the laws to carry into execution the power created by the Constitution.”

In passing upon state statutes claimed to violate the Federal Constitution this court has frequently looked through the form to the substance, and brushed aside anything in the nature of a subterfuge.

Thus a state may, without encroaching upon the foreign commerce power of Congress, enact a statute, whose

purpose is to prevent the introduction within its limits of persons liable to become public charges, and which requires that masters of vessels, upon arrival, list their passengers and give bonds indemnifying the state against the burden of supporting them. (*City of New York v. Miln*, 11 *Peters* 102.)

But it is an invasion of the commerce power of Congress for a state to enact a statute exacting a fixed sum for every passenger landed, whether liable to become a charge or not. (*Passengers Cases*, 7 *Howard* 283.)

After these decisions the State of New York attempted by a statute to provide for the giving of bonds of indemnity, but also to allow the masters of vessels, if they chose, to avoid the giving of bonds by paying a fixed charge for each passenger. Out of the fund thus created the state was to be indemnified against the expense of supporting pauper immigrants. This last statute was plainly so framed as to make it preferable for the master to pay the money instead of giving a bond, and it was thus in a *roundabout* way exercising a power, which the state did not possess. This court in

Henderson v. Mayor, 92 U. S. 259, 268,

held the act unconstitutional, saying (the italics are ours):

“In whatever language a statute may be framed its *purpose* must be determined by its *natural and reasonable* effect, and if it is apparent that the *object* of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore,” it is a tax on passengers.

Again this court, in considering a statute imposing wharfage fees adhered to the same view in

Morgan v. Louisiana, 118 U. S. 455, 462.

“In all cases of this kind it has been repeatedly held that, when the question is raised whether the

state statute is a just exercise of state power, *or is intended by a roundabout means to invade the domain of Federal authority*, this court will look into the operation and effect of the act to discern its purpose."

Similar cases are:

Chy Lung v. Freeman, 92 U. S. 275.

Cannon v. New Orleans, 20 Wall. 577.

Minnesota v. Barber, 136 U. S. 313, 320.

Soon Hing v. Crowley, 113 U. S. 703, 710.

Mugler v. Kansas, 123 U. S. 661.

Loan Association v. Topeka, 20 Wall. 655.

This court in many cases has nullified every form of state interference with the powers of Congress over interstate and foreign commerce "no matter how closely allied to powers conceded to be in the states." (*Henderson v. Mayor*, 92 U. S. 272.)

It surely will be no less ready to condemn any form of congressional interference with a state's right to regulate its internal commerce, "no matter how closely allied to powers conceded to be" in Congress. If a state statute will be annulled when a mere pretext, or a roundabout way of exercising a power not possessed, then an act of Congress of the same character should be also declared invalid.

This leads us to a consideration of the power of Congress to lay internal taxes.

Immediately following the Declaration of Independence, the colonies had become states and later entered into the Articles of Confederation, under which each state retained "its sovereignty * * * and every power * * * not expressly delegated to the United States in Congress assembled." These Articles conferred on Congress no power to tax. The several states undertook

to supply to a common treasury the necessary funds for the purposes of the Confederation.

Thus each state, before the present Constitution was adopted, possessed the only power to levy taxes, and this power was unlimited except so far as it was restricted by the state's constitution.

When a stronger union was found necessary the proposed Constitution did not seek to confer, and the states were unwilling to give to Congress, the general power to lay internal taxes for every purpose. The Constitution expressly limited the powers to certain purposes—which were necessarily expressed in general terms. It proposed to confer, and its adoption conferred, on Congress the "power to lay and collect taxes, duties, imposts and excises, to pay [for the purpose of paying] the debts and provide [providing] for the common defense and general welfare of the United States."

We are concerned here only with the extent of this power as respects internal taxes.

The protective tariff was then an established governmental system in England and elsewhere, and doubtless the Constitution contemplated that in the laying of *imposts* Congress might fix the duties with a view to excluding importations rather than raising revenue.

But there is no warrant for saying that at that time the power to lay internal taxes had any other legitimate purpose *than the raising of revenue*; or that the states in conferring on the national government a concurrent power to levy taxes, ever contemplated that Congress might exercise that power for any other purpose than to raise revenue.

This, we think, is apparent for this reason:

Under its then existing constitution each state had unlimited power to regulate the commercial and other trans-

actions of its citizens. Resort to a roundabout way of doing this through the levying of taxes was not necessary. This is also true of the governments of Europe. There was nowhere any dual system of government requiring a written constitution to accurately separate and define the powers that belong to each of the separate governments, and hence no occasion or incentive to use the taxing power as a cloak to accomplish something other than getting revenue.

Indeed, does anyone suppose that—considering the pronounced disinclination of the states to surrender their own powers—the Constitution would have been adopted by the requisite number of states, if John Marshall in Virginia and Alexander Hamilton in New York, had responded affirmatively to the question, whether the proper exercise of power to tax thus to be conferred, included also the power to regulate, or to prohibit each state from regulating, its internal trade and other local affairs.

In *McCulloch v. Maryland*, 4 Wheaton 317, 431, was presented to this court the questions, whether Congress had power to incorporate, as one of the agencies of the Government, the United States Bank, and this court having decided that it had—whether the State of Maryland could impose a tax upon a branch of that bank located in that state. In deciding that the state statute, in providing such a tax, was an illegal encroachment upon this Federal power, this court (Chief Justice Marshall) made use of the expression, “that the power to tax involves the power to destroy.” That was not the question involved in that case. This was only a way of saying that any state taxing-statute might impair the Federal power. It was a mere phrase, used argumentatively and not to support a Federal statute, but to annul a state statute. In

Veazie Bank v. Fenno, 8 Wall. 533

the question arose during the Civil War, whether Congress could impose a 10 per cent tax on the notes of a State bank, and that statute was upheld upon the ground that it was the proper exercise of the power of Congress to provide a circulation of coin and to authorize the emission of letters of credit, although it was also stated—in answer to the argument that the tax was so excessive as to indicate the purpose of Congress to destroy the bank's franchise—that the court could not pronounce the law unconstitutional for the reason “that the tax was excessive.”

With this as a basis, this phrase of Chief Justice Marshall—that the power to tax involves the power to destroy—has now become in the minds of many in and out of Congress a fixed legal maxim, *by which the powers of Congress are to be measured*. Congress now treats it as fully warranting the use of the taxing power to regulate or prohibit whatever it may not otherwise regulate or prohibit.

Indeed, this court having very recently adjudged that Congress had exceeded its commerce power in directly prohibiting child labor, Congress has now endeavored to accomplish the same result under the form of a tax law.

“Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed.” (*Brown v. Maryland*, 12 Wheat. 439.)

If, therefore, Congress is to be given by this court a free hand in enacting such statutes, the right of the states to regulate their internal affairs will henceforth depend entirely on the will of Congress. It may prescribe the kind of fire escapes to be used on hotels and theatres, by taxing such as do not adopt its kind of fire escape. It may regulate the height of city buildings by imposing a pro-

hibitive tax on owners of buildings exceeding its prescribed height. It may deprive owners of grain within a state of the power to insure it by imposing a prohibitive tax on future contracts, through which alone they may thus insure; it may prohibit, or regulate in a drastic manner through the subordinates of a cabinet officer—for cabinet members cannot in person give such service—every commercial exchange or other business in no way engaged in interstate commerce; and in innumerable other ways Congress may nullify the powers expressly reserved to the states by the 10th Amendment to the Constitution.

But Congress has not always thought that the power to tax implied the power to regulate or destroy.

In 1892 a bill passed one House of Congress, commonly known as the "Hatch Anti-Option Bill," which—like the present Act—excepted from its provisions contracts for future delivery of grain when made by farmers. It imposed a tax of 20c a bushel on all other contracts for the future delivery of grain, required every person engaged in the business of making such contracts to take out a license, and required that the terms of all such contracts should be in writing, and be recorded in books. The purpose was, by the size of the tax, to suppress all future trading. But it was defeated in the Senate, largely by the arguments against its constitutionality. One of these was by Senator (afterwards Chief Justice) White, who argued that the bill was "flagrantly unconstitutional legislation." We quote from his speech as follows (Congressional Record, Vol. XXXIII, 6513, 6515, 6516, 6517):

"This, then, is a bill licensing the Federal government to step over the State line and destroy any contract made within a State between citizens of a State which the Federal government may choose to destroy.
* * * If the theory which this bill propounds is true every vestige of State autonomy has been wiped

off, and today instead of having a government of limited and restricted powers, each government moving by the force of constitutional gravity in its own orbit, we stand the most unlimited and arbitrary government on the face of God's earth. * * * Ah, but I am told that this is a taxing law; that it is an exercise of the taxing power. It is a tax that does not tax. I call attention to this distinction. On the very face of the bill not even a pretext of taxation can be found. By the very terms of the bill no tax can result from its provisions. * * *

"Ah, but it is said this is an exercise of the taxing power, and although it is an exercise of the taxing power which does not tax to produce revenue, we will declare in this bill that we propose to tax for revenue, although we do not propose to so do. If we do violate the Constitution in doing this, when it goes to the court of last resort it will not be able to decipher the false purpose of the bill and will therefore hold the bill not to be unconstitutional. Why will the court hold it not to be unconstitutional? Not because it is not unconstitutional, but because we have breathed into this law a living lie, because we will have declared that our purpose is to tax for revenue, when every line and letter of the bill says the bill is not an exercise of the taxing power at all, but an attempt to destroy the very framework of the Constitution by going into the States and doing that which the Federal Government confessedly has no power to do. * * *

"It is perfectly true that in two or three cases the Supreme Court of the United States have said that where on the face of a statute there was the exercise of taxation, as the statute on its face was a taxing statute, the court would not destroy the face of the statute by wiping out the taxing provision in the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the Constitution. Is this not necessarily true?"

And after pointing out the distinction between imposts and the power to lay down internal taxes, the Senator said:

“In other words, I contend that where power to destroy exists the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional. This being true, it follows that if the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court of the United States to prevent the usurpation.”

This court has not yet assented to this theory that the taxing power of Congress is unlimited. It has, indeed, held that, where a statute is on its face purely and exclusively a taxing law and the only thing relied on to support the charge that it is a subterfuge or roundabout way of doing something else is the amount of the tax, this court will not question the motive of Congress.

McCray v. United States, 195 U. S. 27.

But this court was not yet decided that where, as here, the law does not profess to be solely a taxing measure, but by its title and its terms is also a law regulating something which it is beyond the power of Congress to regulate, the statute must be sustained under the taxing power. To so hold would be to shut one's eyes to the real purpose of the law, when Congress had disclosed that motive and purpose in the terms of the statute.

Indeed, its decisions (already referred to) seem to require this court to deduce from the ~~statute~~ ^{statute} the purpose of Congress, and to annul the law where that purpose is not consistent with the Constitution.

It is here too plain for argument that the *only* real purpose of the Future Trading Act is to regulate the grain exchanges. This is shown, not only by the prohibitive character of the tax, but by all the other provisions of the Act. The power to tax is exercised only, as shown later, to provide a *penalty* for non-compliance with statutory requirements which Congress has no power to impose.

Hence the *tax* of 20 cents a bushel imposed by Section 4 of the Act should be annulled because beyond the taxing power of Congress.

But appellants' contention goes still further. It is that, even if this tax itself be upheld, the regulatory features of the Act should be adjudged void because not within the taxing power of Congress. And for this there seems to be ample warrant in the decisions of this court.

Thus Congress has no right, under its taxing power, to prohibit or create a trade in a state in order to increase its objects of taxation.

United States v. DeWitt, 9 Wall. 42.

There Congress, having the power to tax all oils, preferred to tax only certain oils, and in order to increase the quantities of oils of the kind it taxed, it prohibited in the taxing statute the use of certain mixed oils which it did not tax; and this court, in annulling this prohibitive feature of the Act, said:

"Has Congress power, under the Constitution, to prohibit trade within the limits of a State? * * * But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. * * *

If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

License Tax Cases, 5 Wall. 462, where in discussing the power of Congress to tax, this court said, "But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it."

The Future Trading Act ~~not~~ly creates "contract markets" in order that Congress may—*not* tax—but regulate, future trading thereon.

U. S. v. Doremus, 249 U. S. 86-93, which involved an Act of Congress—the so-called Harrison Narcotic Drug Act. This Act purported to be based on the power of Congress to levy taxes. The District Court held a certain section of the Act unconstitutional for the reason that it was not a revenue measure, but was an invasion of the police power reserved to the states. This court said (p. 93) (*italics ours*):

"Of course, Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. *If the legislation enacted has some reasonable relation to the exercise*

of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

And a bare majority of the court upheld the section in question, because in their opinion it did "tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue," and they could not agree to the contention that the section in question "can have nothing to do with facilitating the collection of revenue;" while the minority of the court, putting a different construction on the section, held it a mere attempt to invade the police power of the States.

Thus in this recent case this court was unanimous in holding that every provision of the taxing law must have some reasonable relation to the exercise of the taxing authority conferred on Congress, and must tend to facilitate the collection of the revenue. Its members disagreed only as to the application of that principle to the terms of that statute.

That decision alone would seem to require that these regulatory features of The Future Trading Act be held unconstitutional.

Now to apply the foregoing to the case at bar—does any of the regulatory provisions of the Future Trading Act summarized on pp. 31-33 of this brief have any reasonable relation to the tax imposed by that Act? Do they tend to aid in the ascertainment and collection of taxes? Is there any proper relation between these regulations treated as a means, and the end—the collection of the tax? Do they have any adaptiveness or appropriateness to a law which imposes a tax upon future trading by others than members of an exchange? Is the end sought "legitimate," and do these provisions "consist with the letter and spirit of the Constitution"?

None of these regulating provisions relate to persons or transactions subject to the tax imposed by the Act. They apply only to an exchange, which becomes a contract market, and such an exchange and all future contracts of its members are free from the tax.

How can forcing representatives of farmers' organizations into membership in the exchange aid in ascertaining or collecting the tax imposed? The contracts of these associations are expressly exempted from the tax.

In what way does the provision of the Act which breaks down the commission rule of the exchange in favor of farmers' organizations contribute to the collection of the tax? The present commission rule, as modified by the Act, will relate only to transactions which are exempt from this tax.

What possible relation to the collection of the tax have those provisions, which require members of a "contract market" to make such memoranda, and the exchange to make or cause its members to make, such reports and records of their transactions, as the Secretary of Agriculture may prescribe, and expose those memoranda, reports and records to the inspection of the Department of Agriculture? They relate exclusively to transactions which are not taxed, and will in no way aid the Government in discovering transactions which are taxed. As soon as the revenue officers learn that any person is a member of an exchange which has been made a contract market—which he may ascertain by reference to the published membership roll of the exchange—they know that all his transactions, whether made for his own account or as agent for others, are free from the tax. A provision requiring members of an exchange—which had *not* become a "contract market"—to keep records of their transactions might be proper, because thereby revenue officials might ascertain whether any of those trans-

actions were sales for future delivery of grain. But the provisions now under consideration can have no such purpose, and contribute to no such result.

How can the provisions of this Act requiring the exchange to prevent the dissemination of false reports concerning crops, or the manipulation of prices, or the cornering of grain aid in any way the collection of this tax? Such reports, or manipulation, or cornering, might temporarily operate to increase or decrease the number of contracts for future delivery on the "contract market," but as these are untaxed, such reports would not have the slightest effect upon the revenue to be derived from the tax. Even if its purpose or effect were to increase such revenue it would be unconstitutional. *United States v. DeWitt, supra.*

What relation to the collection of the tax has the provision of the Act requiring the exchange to enforce any order the Secretary of Agriculture may see fit to make depriving any person of trading privileges? All the transactions which a member of an exchange will thus be prevented from making are in the untaxed class.

Surely Congress has no power to penalize a person, who may have evaded a tax, by depriving him of the privilege of trading on an exchange. Much less may it do so when such person is a member of a "contract market" and is not evading any tax. It may only enforce a taxing statute by providing therein the usual money penalties and punishment.

How is the collection of the tax aided by the provision which enables the Secretary of Agriculture to invade the privacy of the offices of the exchange and its members (when the exchange is a "contract market") for the purpose of ascertaining the facts regarding the operation of boards of trade with a view to publishing the results

of such investigation? Surely such investigations as a taxing law may authorize must be confined to investigations which may lead to the discovery of taxable transactions. They can not cover the transactions of an exchange or its members which are not taxed.

On the face of this Act its purpose is two-fold. (1) It imposes a prohibitive tax on certain transactions. Its purpose was not to tax contracts for future delivery when made by or through a member of an exchange, like this Board, which is "located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service." This was emphasized by the petition of the Secretary of Agriculture to set aside the temporary restraining order of this court.

(2) Its main purpose is to place all boards of trade under the control of the Secretary of Agriculture, and to open their doors to co-operative associations of farmers under circumstances that would permit them to market their crops on the exchange at cost. So dominant is this purpose that the title of the Act should be read as "An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, *for the purpose of regulating boards of trade.*"

If the commerce power of Congress were unlimited, Congress would have incorporated these provisions into a purely regulating statute; and as every statute, to be effective, must contain some provision which will compel obedience to it, such act would have made boards of trade subject to the usual penalties or punishment for non-compliance therewith.

But the commerce power of Congress does not extend to any of the regulating features of this Act. Hence

Congress conceived the novel idea of compelling exchanges to comply with the Act by making *members* of a non-complying exchange subject to a prohibitive tax on their future trading. Thus is presented the first attempt of Congress to escape the limitations imposed by the Constitution by using its taxing power *to provide a penalty*, with which to compel compliance with a statute Congress has no power to pass.

There is here no pretense of raising revenue. A prohibitive tax is laid, which is to operate as a penalty to compel compliance with an unconstitutional law. Could one conceive a plainer "roundabout way" to escape the limitations of the Constitution? Could one devise any more obvious *pretext* for evading its provisions?

In the present Act the misuse of the taxing power is most glaring; for it does not impose a penalty upon boards of trade (whose compliance with the Act is sought) by exempting them from a tax otherwise imposed upon them? It offers to *members* of an exchange exemption from a prohibitive tax in order to force these members to compel compliance by their exchange with these regulatory enactments.

Have we not here reached the limit of subterfuge? How can the citizens of this Republic be expected to respect the Constitution, if such transparent evasions as this receive the sanction of this court?

A recurrence to another principle may be here appropriate. In

Boyd v. United States, 116 U. S. 635,

Monongahela Navigation Co. v. United States,
148 U. S. 325,

in annulling certain acts of Congress, this court said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in

that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principis.*"

It is therefore submitted that neither the tax imposed upon future contracts nor these regulating features of this Act can be sustained under the taxing power of Congress.

V.

THE "PUT" AND "CALL" PROVISION.

If Section 3, which imposes a prohibitive tax on "puts" and "calls," were in a statute which professed on its face to be exclusively a taxing statute, the decisions of this court would preclude an attack upon its validity.

But such is not the case here. This statute professes to regulate the transactions of members of an exchange as well as to tax. All the other provisions of the Act are clearly regulatory, and this tax is prohibitive, being more than double the present price of some kinds of grain taxed.

Furthermore, these "puts" and "calls" are clearly intrastate transactions only. (Rec., 8.) The State of Illinois has already legislated respecting them in the following provision (Revised Statutes of Illinois, Chap. 38, Sec. 130):

"Whoever contracts to have or give to himself, or another, the option to sell or buy at a future time any

grain or other commodity * * * where it is, at the time of making such contract, intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by receipt or delivery of said property, but by the payment only of difference in prices thereof, or whoever forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 or more than \$1,000, or confined in the county jail not exceeding one year, or both."

Do not the foregoing considerations make inapplicable to Section 3 the decisions of this court that an improper motive of Congress will not be inferred from the size of the tax alone; and do they not warrant a decision that Section 3, as well as the others, must be regarded as regulatory in character and beyond the power of Congress?

In other words, should not all the provisions of this Act be adjudged unconstitutional?

Respectfully submitted,

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Counsel for Appellants.



APPENDIX.

AN ACT

TAXING CONTRACTS FOR THE SALE OF GRAIN FOR FUTURE DELIVERY, AND OPTIONS FOR SUCH CONTRACTS, AND PROVIDING FOR THE REGULATION OF BOARDS OF TRADE, AND FOR OTHER PURPOSES.

This act shall be known by the short title of "The Future Trading Act."

Sec. 2. That for the purposes of this act "contract of sale" shall be held to include sales, agreements of sale and agreements to sell. That the word "person" shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations and trusts. That the word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

Sec. 3. That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents

per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs."

Sec. 4. That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or

(b) Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

Sec. 5. That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as

“contract markets” when, and only when, such boards of trade comply with the following conditions and requirements:

(a) When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consumed at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

(e) When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility: *Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such co-operative association.

(f) When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this act.

Sec. 6. That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of gov-

ernment made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive unless within 15 days after such suspension or revocation by the said commission such board of trade appeals to the Circuit Court of Appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such a board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the Circuit Court of Appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the Circuit Court of Appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such

board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further*, That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this act the provisions, including penalties, of section 12 of the interstate commerce act, as amended, relating to the attendance and

testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States Circuit Court of Appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 7. That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as may have

been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

Sec. 8. That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least 90 days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective, the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

Sec. 9. That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person, and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any per-

son found guilty of violating the provisions of this act under the proceedings prescribed in section 6 of this act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in co-operation with existing governmental agencies, shall investigate marketing conditions of grain and grain products, and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

Sec. 10. That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per cent of the tax levied against him under this act and shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than \$10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution.

Sec. 11. That if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 12. That no tax shall be imposed by this act within four months after its passage, and no fine, imprisonment

or other penalty shall be enforced for any violation of this act occurring within four months after its passage.

Sec. 13. The Secretary of Agriculture may co-operate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employes, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved August 24, 1921.

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WM. R. STANSBURY
CLERK

No. 616.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants.

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

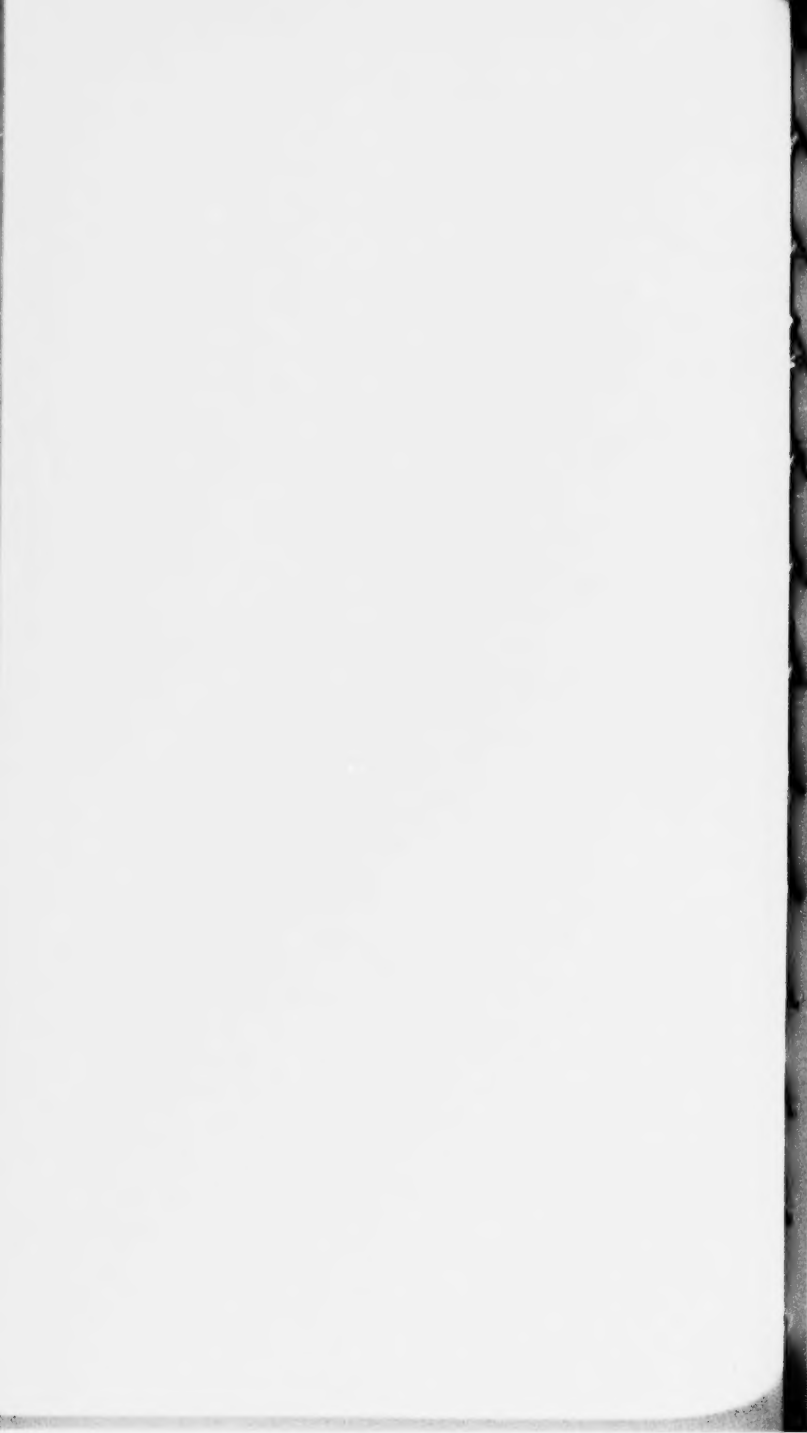
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR
THE NORTHERN DISTRICT OF ILLINOIS.

**MOTION TO AMEND AN ORDER ENTERED
NOVEMBER 21, 1921.**

HENRY S. ROBBINS,

Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS,

**APPELLANTS' SUGGESTIONS IN SUPPORT OF
THEIR MOTION TO AMEND THE ORDER EN-
TERED NOVEMBER 21, 1921.**

The remaining part of this order as entered is as follows:

“It is ordered, the appellees not objecting, That the Board of Trade of the City of Chicago and its directors, appellees, are restrained from seeking or accepting from the Secretary of Agriculture a designation of said Board of Trade as a ‘contract market’ under the Act of Congress approved August 24, 1921, entitled ‘The Future Trading Act,’ or from admitting to membership in said Board any representative of any co-operative association of producers as required by said Act; or from modifying its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a ‘contract market;’ and from otherwise complying with the terms of said Act prior to the final judgment of the court herein.”

The purpose of the original motion was to preserve the *status quo* until the decision of this court upon the validity of The Future Trading Act. In granting the motion this court recognized its power to preserve this status. Such power belongs to every appellate tribunal. (See appellants' brief on the original motion.) It includes the power to make *any* order necessary to preserve, until the final decision, the condition existing when the order is made.

The order, if amended as here asked, will do this. *The present order does not.* At the present time every member of the Board of Trade may sell grain for future delivery without paying any tax thereon. If the present order is not amended, these members after December 24, 1921—when The Future Trading Act goes into effect—must either stop making any sales for future delivery or subject themselves to a tax of 20 cents a bushel on such sales, or to the heavy penalties of the Act, during the pendency of this appeal, if the Act shall be adjudged valid. In either event, the existing status does not continue until the final decision of this court. The right to continue making sales for future delivery free from any contingent liability does not continue during the pendency of the appeal. The order as now entered only restrains the Secretary of Agriculture and the other officials from collecting from appellants *during the pendency of this appeal* and 20 days after final judgment herein, any tax or penalty accruing under such Act.

As the order now stands, the Board of Trade is restrained from becoming a "contract market" which to that extent properly preserves the present status. But in doing this the order disturbs the status as to members of this exchange, who must either cease trading or continue trading under a contingent liability for extremely heavy taxes and penalties. The only safe course

for these members to adopt will be to cease all future trading on this important exchange, and this doubtless will result in a great disturbance of the grain trade of the country.

The Future Trading Act does not contemplate making members of the principal exchanges pay any tax upon their sales for future delivery. But for the order of this court restraining the Board from becoming a "contract market" it would become a "contract market" and then no member of this Board could become liable for any tax imposed by the Act. Hence the amendment proposed will not deprive the Government of any revenue.

Indeed, the restraining order which the amendment seeks against the collection of any tax or penalty accruing while the case is before this court, is a mere incident, and a necessary incident, to the order entered by this court restraining this Board from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

The only effect of the order, if amended, would be to provide effectively that this Future Trading Act shall not become operative as against members of the Chicago Board of Trade until this court has decided upon its constitutionality.

HENRY S. ROBBINS,
Counsel for Appellants.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

vs.

Appellants,

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION.

*To Appellees in the Above Entitled Cause
and Their Counsel:*

Please take notice that on Monday, the 5th day of December, 1921, at 12 o'clock M., or as soon thereafter as counsel can be heard, we shall present to the court a motion to amend the order entered in the above entitled cause on the 21st day of November, 1921, a copy of

which motion and suggestions in support thereof is herewith served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and suggestions in support thereof, this day of December, 1921.

.....
Counsel for Certain Appellees.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

**MOTION TO AMEND ORDER ENTERED IN THE
ABOVE ENTITLED CAUSE ON NOVEMBER 21, 1921.**

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

To amend the order entered in the above entitled cause on the 21st day of November, 1921, by striking out therefrom the following clause:

“Also, that during the pendency of said cause in this court and for twenty (20) days after final judgment herein, the appellees, Henry C. Wallace, Secre-

tary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other members of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act, or from taking, during said period, any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act."

and inserting in lieu thereof:

"Also, the appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants or any other member of said Board of Trade, any tax or penalty which may have accrued, or been incurred under said Future Trading Act, *during the pendency of said cause in this court and for twenty days after final judgment herein*, or from taking during said period any other steps against said Board of Trade or any of its members to enforce or compel their compliance, or punish for non-compliance, with any of the provisions of said Future Trading Act."

The order is in the terms of the motion therefor, except that the italicized words were transposed. This motion to amend only seeks a change in the location of these words.

The grounds for said motion are stated in the accom-

panying suggestions, which also set out the remaining part of the order as entered.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.



Office Supreme Court, U. S.
FILED

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WM. R. STANSBURY
CLERK

No. 616.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants.

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR
THE NORTHERN DISTRICT OF ILLINOIS.

**MOTION TO ADVANCE AND FOR AN ORDER PRE-
SERVING THE STATUS QUO, AND BRIEF IN
SUPPORT THEREOF.**

HENRY S. ROBBINS,

Counsel for Appellants.



IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

*To Appellees in the above entitled Cause and their Coun-
sel:*

Please take notice that on the ... 15th
day of November, 1921, at 12 o'clock m., or as soon
thereafter as counsel can be heard, we shall present to the
court a motion to advance and for an order preserving
the *status quo*, a copy of which motion and a brief in
support thereof is hereto attached and served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and brief
this.....day of November, 1921.

.....
Counsel for Certain Appellees.

.....

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.....



I am authorized by the Solicitor General to say that he concurs in the motion to advance. He also joins me in the suggestion that, if agreeable to the Court, it will suit the convenience of both counsel not to have the case set before the 1st of February.

HENRY S. ROBBINS

I am authorized by the Solicitor General to say
that he concurs in the motion to advance. He also
joins me in the suggestion that, if agreeable to the
Court, it will suit the convenience of both counsel
not to have the case set before the 1st of February.

HENRY S. ROBBIN.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

**MOTION TO ADVANCE AND FOR AN ORDER
PRESERVING THE STATUS QUO.**

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

- (1) To advance said cause and set the same down for an early hearing, and
- (2) For an order preserving the *status quo* while this cause is pending in this court, by restraining appellees, Board of Trade of the City of Chicago and its directors, from seeking or accepting from said Secretary of Agriculture prior to the final decision of this court a designation of said Board as a "contract market" under The Future Trading Act, or from admitting to membership

in said Board, prior to said decision, any representative of any co-operative association of producers as required by said Act; or from modifying, prior to said decision, its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a "contract market"; and from otherwise complying with the terms of said Act prior to said decision, and also restraining appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, from at any time hereafter collecting or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other member of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act while this cause is pending in this court and for twenty (20) days after its final decision, and also from taking during said period of time last mentioned any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act.

The reasons for thus preserving the *status quo* are that this would not impose any pecuniary loss upon the Government or prejudicially affect the public, and that in the absence of such order appellants would not fully benefit by a decision of this appeal in their favor.

These reasons are amplified in the brief hereto attached.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.

BRIEF FOR APPELLANTS IN SUPPORT OF
THEIR MOTION TO ADVANCE AND FOR AN
ORDER MAINTAINING THE STATUS QUO.

This is an appeal from an order dismissing for want of equity a bill filed by appellants in behalf of all the members of the Chicago Board of Trade against that exchange and its directors and also the Secretary of Agriculture, the Commissioner of Internal Revenue, the U. S. District Attorney at Chicago and the Collector of Internal Revenue for that district, to enjoin compliance by said Board of Trade and its directors with the recent Act of Congress entitled, "The Future Trading Act," and the enforcement of that act by the other appellees.

Upon the filing of the bill the District Court entered a rule to show cause why a temporary injunction should not issue and also restraining appellees from complying with or enforcing compliance with said act before the hearing of such application for an injunction.

Some appellees filed motions to dismiss for want of equity and on the return of the rule to show cause the District Court dismissed the bill for want of equity.

The sole purpose of the bill being to have The Future Trading Act declared unconstitutional, the District Court allowed an appeal to this court and directed that the existing temporary restraining order continue in force until this court should act upon appellants' application for a continuance of such order, provided such application should be made by November 21, 1921.

The importance to the public (as well as to the grain exchanges) of an early decision on the validity of this

statute is so apparent that nothing need be said upon that part of the motion, which seeks to have the case advanced. Indeed, we believe that the Government will concur in the request for an early hearing.

We confine ourselves, therefore, to presenting the reasons why the *status quo* should be preserved pending the hearing in this court.

That this court has ample jurisdiction to preserve the *status quo*—as contemplated by this motion—to the end that the parties may have the full and complete relief which they are entitled to receive from this court, is no longer an open question.

Omaha St. Rwy. Co. v. Interstate Com. Com.,
222 U. S. 582, and cases cited.

As stated by this court (247 U. S. 220):

“The present status should be maintained until such time as the court may consider all of the grave questions of laws * * * connected with this complicated and important litigation.”

This Act is entitled, “An Act taxing contracts for the sale of grain for future delivery and options for such contracts and providing for the regulation of Boards of Trade, and for other purposes.”

Thus the purpose of the Act is two-fold:

First. To impose a tax of 20 cents a bushel on the following transactions:

(a) Uni-lateral contracts for grain, commonly known as “puts and calls.” (Sec. 4.)

(b) All contracts for future delivery of grain *not* made—

1—either by the present owner or grower of grain, or associations of such owners or growers;

2—or by or through a member of one of the principal grain exchanges—that is, exchanges having recognized official weighing and inspection service, and

upon which cash grain is sold in sufficient volume to reflect the general value of grain. Such exchanges are to be designated as "contract markets" by the Secretary of Agriculture. (See sub-clause (a) of Section 5 of the Act.)

Second. The other purpose is to regulate these designated grain exchanges and their members in the following respects:

(1) The special charter granted by the State of Illinois to the Chicago Board of Trade confers on it the power to admit such members "as it may see fit" and the Illinois courts refuse to interfere with the exercise of this power. Sub-clause (E) of Section 5 of the Future Trading Act *compels* this exchange (and others) to admit to membership any duly authorized representative of any co-operative association of producers.

(2) Again, the charter of this Board authorizes it to make such rules and by-laws for the management of the business of its members "as it may think proper," and under this power the Board has for many years maintained a rule requiring its members to charge their principals certain minimum rates of commission; and the Illinois courts hold such rule to be valid. The Future Trading Act breaks down this rule, as to farmers' co-operative associations, by requiring exchanges to sanction so-called "patronage dividends," whereby the representative of a farmers' co-operative organization admitted to membership may rebate all commissions earned by him at the regular rates back to the members of the co-operative association on the basis of the quantity of grain sold by each member through such representative, thus enabling these organizations to transact business on the exchanges at *cost*. The result of this will be to much impair, if not ultimately to destroy—the value of memberships in this exchange, which are now worth about \$7,000.

(3) The Act also requires every member of an exchange making contracts for future delivery to evidence such trades by detailed memoranda in writing, and to preserve these memoranda for three

years or longer, if the Secretary of Agriculture so directs.

(4) The Act also requires each exchange to provide for making and filing, either by the Board or its members of *reports*, in the form to be prescribed by the Secretary of Agriculture, showing the details of all transactions entered into and also for the keeping of *records* showing the details of all such transactions in a manner to be prescribed by the Secretary of Agriculture and for the period of three years.

(5) The Act also authorizes the Secretary of Agriculture to deprive any member of an exchange, or other person, of the right to make contracts for future delivery if he shall violate the terms of the Act, and also requires the exchange to deny to any member or other person the privilege of trading on the exchange during the time he shall be deprived of that privilege by the Secretary of Agriculture.

A fine of not more than \$10,000, or imprisonment for not more than one year, or both, is the punishment prescribed for any person violating the provisions of the Act; but this does not apply to the boards of trade.

Compliance with the Act by the boards of trade is enforced by providing that the members of such exchanges as shall be designated as "contract markets" shall be exempt from the tax, and the Secretary of Agriculture is directed to recognize as "contract markets" only such exchanges as comply, and continue to comply, with the provisions of the Act.

The Act was approved August 24, 1921, but it provides that no tax shall be imposed and no penalty be enforced for any violation of the Act, *occurring within four months after its passage*. Thus by the terms of the Act it becomes operative on the 24th of December, 1921.

1.

Contracts for future delivery of grain must, by the rules of the Board of Trade, be made—and they are in fact made—only in its exchange room between certain

market hours, and only between members of the Board there present.

More than three-quarters of those contracts are settled by offsetting other like counter-contracts made between members in the exchange room, and the balance of said contracts are performed by actual delivery; but this delivery in all cases is required by the rules of the Board to be, and is, by the delivery of warehouse receipts issued by the grain-mixing public warehouses of Chicago, which under a statute of Illinois are required to mix immediately all grain tendered for storage with other grain already in store of like grade, and to state on their receipts the fact that the grain covered by the receipt is so mixed; and when the receipts are tendered to obtain the grain this statute also requires the warehouseman to deliver such of the grain in his warehouse of the grade called for by the receipt, *as has been longest in store.*

Thus all grain coming to Chicago from other states and going into elevators at once loses its identity, and becomes an unidentified part of the common mass of the property in the state.

All these contracts for future delivery contemplate only the delivery of warehouse receipts, upon which holders will get only the required number of bushels of the proper grade out of a common mass of grain in the elevator, the component parts of which, if from other states, have completely lost their interstate character. (See Record pp.)

That this future trading is in no sense interstate commerce seems to have been settled by this court in

Ware & Leland v. The Mobile Co., 209 U. S. 405.

That case involved future contracts made upon the New York Cotton Exchange for the delivery of bales of cotton, which continued to preserve their identity. The

present case becomes still stronger because shipments of grain from other states *do* lose their identity when stored in the Chicago elevators.

II:

Nor can the provisions of The Future Trading Act above referred to, which compel the exchanges to admit to membership representatives of farmers' co-operative associations, which break down the commission rule of this exchange, and require the exchanges and their members to make and preserve memoranda, reports and records of their transactions, be sustained under the taxing power of Congress.

This court has held that provisions claimed to be in the exercise of the taxing power must have some reasonable—and not merely remote—relation to the exercise of the taxing authority conferred by the Constitution.

U. S. v. Doremus, 249 U. S. 86, 93.

U. S. v. DeWitt, 9 Wall. 41-44.

None of these foregoing provisions relate to persons or transactions subject to the tax imposed by the Act. Both the exchange and all the future contracts of its members are exempt from the tax. How then can forcing unacceptable persons into membership in the exchange, or breaking down the commission rule of the exchange, or compelling the exchange or its members to make or keep memoranda, reports or records of transactions not taxed, contribute in the slightest degree to the imposition, ascertainment or collection of a tax on contracts of persons, who are not members of the exchange?

Thus it seems that these provisions of The Future Trading Act, so far as they concern the Chicago Board

of Trade and its members, can be sustained neither under the taxing, nor the commerce, power of Congress.

Nor does R. S., Section 3224—which prohibits suits to enjoin the collection of taxes—have any application here. That section is not of universal application; it has its exceptions.

Pacific Whaling Co. v. U. S., 187 U. S. 449-452.

Dodge v. Osgood, 240 U. S. 118, 122.

Section 3224 is to be considered with reference to the purpose of its enactment. This was to avoid having the revenue of the Government tied up by injunction suits, another remedy being provided by statute through a suit by the taxpayer to recover after he has paid his tax under protest. But appellants can not test the constitutionality of this Future Trading Act by paying the tax under protest and then suing to recover; for, unless restrained, the Board of Trade, under the compulsion of this Future Trading Act, will accept designation as a "contract market," and as soon as it does so, the contracts for future delivery of these appellants will be exempt from the tax imposed by the Act. They could not then pay, because the Collector of Internal Revenue would not accept from them any tax; nor could they claim to have paid under protest, if they paid a tax not exacted from them.

Again, the purpose of Section 3224 is to prevent the withholding of the tax when due and the consequent embarrassment to the Government from a delayed revenue. But the Government will never get one dollar from this 20 cents per bushel tax imposed upon future trading. With wheat now selling in the market at \$1.00 a bushel and corn at 46c a bushel and oats at 31c a bushel (Rec., ...), no person can afford to make, and pay the tax upon, a single contract for future delivery of grain. The tax is,

and is intended to be, a prohibitive one, and will never produce one dollar of revenue; hence the reason for Section 3224 here fails. The other statutory remedy is not available to these appellants, and they have no remedy except by bill and injunction.

The purpose of Section 3224 would not be defeated by enjoining these officials from collecting any tax or penalty under this Act from the members of this Board of Trade until the constitutionality of this Act shall be determined.

Indeed, the injunction against the collection of any tax or penalty or punishment while the case is before this court is a mere incident, and a necessary incident, to an order restraining this Board of Trade from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

Indeed, no order should be entered restraining the Board of Trade from becoming a "contract market," unless the court shall also restrain these officials, and their successors, from collecting from any member of this Board of Trade any tax or penalty, or proceeding criminally against any such member for any act or omission, *which shall accrue or be incurred during the pendency of this appeal in this court and at least twenty days thereafter*, this twenty days being necessary to afford time to this exchange to qualify as a contract market, should the decision of this court uphold the statute.

For if without this clause the Board of Trade shall be enjoined from becoming a "contract market," every member of the Board making a contract for future delivery while this case is pending in this court would be confronted with the alternative of either becoming contingently liable to pay these prohibitive taxes, or of not making any contracts for future delivery at all, during

the pendency of this appeal—and the latter would be the only safe course for all members of this exchange to adopt—with the result that all future trading on this exchange—the largest grain market in the world—would be temporarily abandoned, and the grain trade of the country would be thrown into great confusion, followed doubtless by many business failures.

Indeed, the only effect of ~~the~~ ^{say it} ~~such an~~ order would be to provide that this Future Trading Act shall not become operative, as against the members of the Chicago Board of Trade, until this court shall have decided upon its constitutionality.

That the public will not suffer by this short suspension of the Act, as respects this one exchange, is evidenced from the fact that this exchange and its future trading have been existent for more than seventy years without the necessity of any congressional regulation, and Congress, itself, postponed the operation of the present Act for four months after its passage.

It is therefore respectfully submitted that the *status quo* should be preserved by a restraining order in the terms specified in the motion here submitted.

HENRY S. ROBBINS,
Counsel for Appellants.



THE [illegible] OF [illegible]

BY [illegible]

THE [illegible] OF [illegible]

BY [illegible]

THE [illegible] OF [illegible]

BY [illegible]

THE [illegible] OF [illegible]

BY [illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN HILL, Jr., ET AL., APPELLANTS,	} No. 616.
<i>v.</i>	
HENRY C. WALLACE, SECRETARY OF AGRICULTURE, et al., appellees.	

MOTION.

Comes now the Solicitor General and, on the petition of Henry C. Wallace, Secretary of Agriculture, filed herewith and made a part hereof, moves the court to vacate the order entered herein on November 21, 1921, and without prejudice to the rights of any of the parties, to substitute in lieu thereof an order in accordance with the prayer of said petition.

JAMES M. BECK,
Solicitor General.

4

such trading is carried on under certain other conditions which may not obtain in the bulk of the transactions as ordinarily conducted on said board.

6. That your petitioner is informed and believes that the possibility of having to pay said tax may result in complete and abrupt cessation of future trading in grain on said board during said period because such trading normally is continuous, the volume of transactions is great and said tax is substantial in comparison with price fluctuations in grain, as alleged in the bill of complaint herein, and may therefore cause other members of said board, as well as the appellants herein, to feel that, as alleged in the bill of complaint, they can not afford to deal in future contracts in grain while their liability for the payment of said tax is uncertain.

7. That said board of trade is the leading grain exchange in the United States and your petitioner is fearful that sudden and abrupt cessation of future trading in grain thereon might result in serious inconvenience and perhaps great losses, not only to the members of said board of trade but also to the grain growers of the United States and to other persons using grain in their business, such, for instance, as millers and feeders of live stock, who depend upon and utilize the hedging facilities afforded by said board of trade to insure them against losses and to enable them, as they claim, to sell their products to the ultimate consumer on a much narrower margin of profit than they would otherwise be able to do, so that ultimately such sudden

and abrupt cessation of trade might affect all of the people in the United States, or at least a great percentage thereof, adversely.

8. That the injury which may thus be wrought upon the membership of said Chicago Board of Trade who are not complainants in this suit, as well as upon the public generally, and which board of trade, as aforesaid, desires that it be designated by your petitioner as a contract market, would be out of all proportion to the injury which possibly could be inflicted upon the appellants by vacating the order of November 21, 1921, and granting the relief herein prayed for, since it appears from the bill of complaint in this suit that the only substantial injury, if any, that might be suffered by the appellants, *pendente lite*, would be through the admission to membership on said board of trade of the representatives of cooperative associations against which possible injury the appellants would be fully protected by the granting of the relief herein prayed for.

The premises considered, your petitioner, appearing solely for the purposes of this petition and for no other, respectfully prays:

1. That the order of November 21, 1921, aforesaid, be vacated, and, with a view to preserving, *pendente lite*, the interests of all parties to the suit and otherwise there be substituted in lieu thereof an order—

(a) Restraining until twenty (20) days after final judgment herein the Board of Trade of the city of Chicago and its officers and direc-

tors from admitting to membership thereof and privileges thereon any representative of any cooperative association of producers not otherwise admissible to membership by virtue of the rules of said board of trade in effect prior to the institution of this suit, and from making and filing for or requiring appellants to make and file any report required by any rule or regulation issued by the Secretary of Agriculture under the future trading act.

(b) Restraining during said period the said Henry C. Wallace, Secretary of Agriculture, from refusing to designate said board of trade as a contract market under the future trading act solely because of the refusal of said board of trade to admit to membership thereof and privileges thereon any representative of any cooperative association of producers not otherwise admissible to membership by virtue of the rules of said board of trade in effect prior to the institution of this suit, and from enforcing during said period any rule or regulation issued by the Secretary of Agriculture under the future trading act by which appellants, or said board of trade for them, would be required to make and file reports with the Secretary of Agriculture.

2. And for such other, different, or further relief in the premises as to this honorable court may seem appropriate.

HENRY C. WALLACE,
Secretary of Agriculture, Petitioner.

JAMES M. BECK,
Solicitor General.

CITY OF WASHINGTON,

District of Columbia, ss:

Henry C. Wallace, being duly sworn, deposes and says: That he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

HENRY C. WALLACE.

Subscribed and sworn to before me, at Washington,
D. C., this third day of December, 1921.

[SEAL.]

JAMES B. HORIGAN,

Notary Public in and for the District of Columbia.

U. S. Supreme Court, U. S.
FILED
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WM. H. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1921.

No. 616.

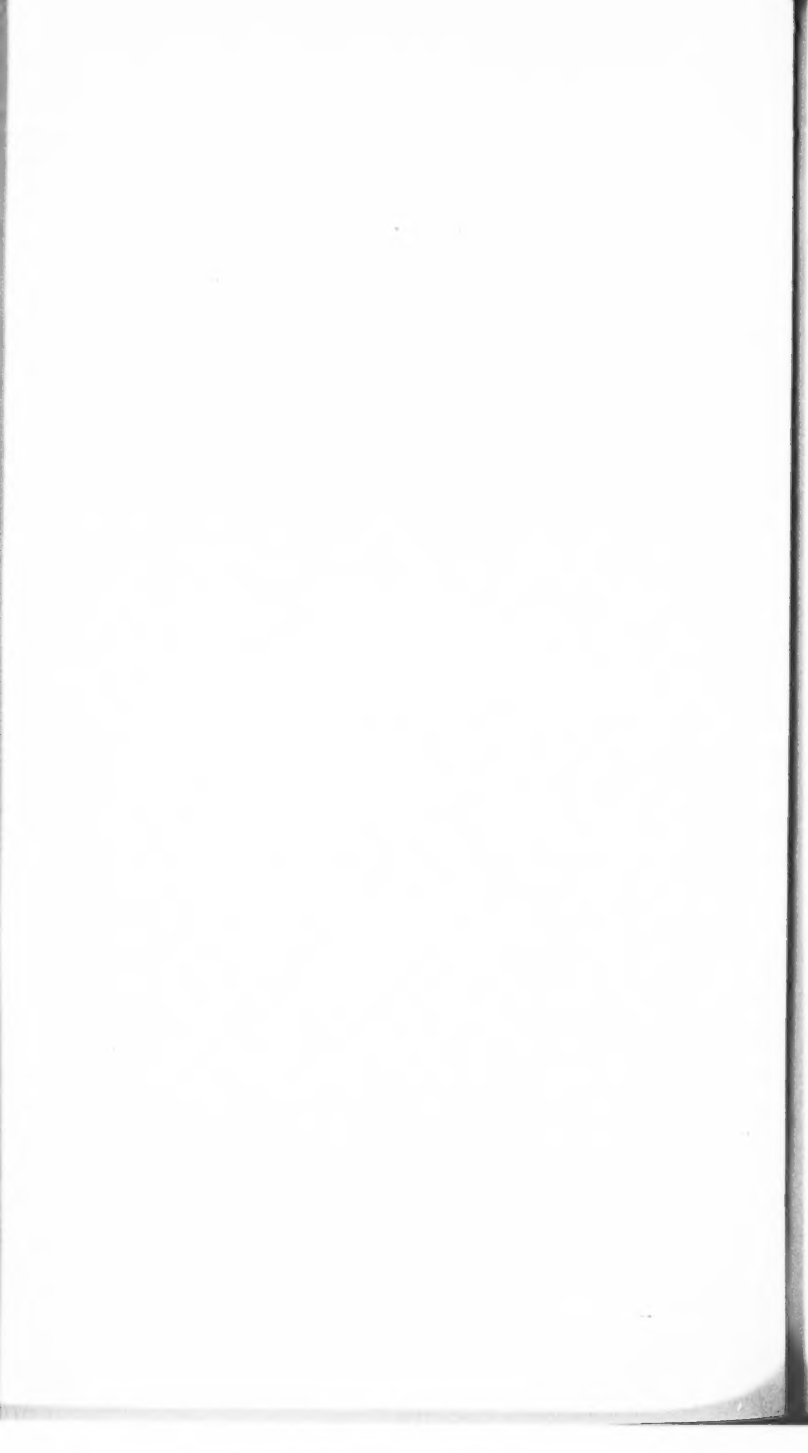
JOHN HILL, JR., ET AL., APPELLANTS,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE,
ET AL.

REPLY BRIEF.

HENRY S. ROBBINS,
Counsel for Appellants.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1921.

No. 616.

JOHN HILL, JR.; ET AL., APPELLANTS,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE,
ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF.

The present suit is just such a suit as we understood Mr. Justice Brandeis to suggest. It is a suit by members of the Board of Trade against the board and its directors, to enjoin them—

“From admitting to membership in said Board of Trade any representative of any co-operative association of producers * * * or from taking any

other steps for the purpose or with the intent to comply with said act" (Rec., p. 15).

The Solicitor General appeared concerned lest appellants should jump from the frying pan into the fire. We do not share in this apprehension. It arose out of that provision of the act—Section 11—that the invalidity of a part shall not annul the whole act. This, we apprehend, must be applied so as not to defeat the clear purpose of the act, which is—as was emphasized by the attitude of the Secretary of Agriculture on the motion for a stay—that contracts for future delivery on the boards of trade like the Chicago Board of Trade should not be taxed.

Furthermore, the result feared will not follow from a strict application of Section 11.

Appellants seek either an annulment of the tax, or an annulment of the regulatory features of the act enumerated on pages 31 and 32 of appellants' brief. If the act is annulled, the regulatory features might remain a statute without a penalty, and in no way troublesome.

If the regulatory features of the act are annulled as having no relation to the collection of the tax, and nothing more, then the rest of the act would remain, including Section 5-*a*, as follows:

"(a) When located at a terminal market upon which cash grain is sold in sufficient volume and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service."

The Chicago Board of Trade meets this requirement. The duty would rest upon the Secretary of Agriculture to

designate it as a contract market, and thereby all its members would be freed from tax; and the contingency suggested by the Solicitor General, that the members of this exchange would be subject to the tax is not warranted.

The Solicitor General also contended that that part of the bill which sought to enjoin the internal revenue officials from the collection of the tax violated Revised Statutes, Section 3224, which prohibits suits to enjoin the collection of taxes.

That section is not of universal application; it has its exceptions.

Pacific Whaling Co. vs. U. S., 187 U. S., 449-452.

Dodge vs. Osgood, 240 U. S., 118-122.

Section 3224 is to be considered with reference to the purpose of its enactment. This was to avoid having the revenue of the Government tied up by injunction suits, a remedy being provided by statute, through a suit by the taxpayer to recover after he has paid his tax under protest. But appellants cannot test the constitutionality of this Future Trading Act by paying the tax under protest and then suing to recover; for unless restrained, the Board of Trade, under the compulsion of this Future Trading Act will accept designation as a "contract market," and as soon as it does so, the contracts for future delivery of these appellants will be exempt from the tax imposed by the act. They could not then pay because the Collector of Internal Revenue would not accept from them any tax; nor could they claim to have paid under protest, if they paid a tax not exacted from them.

Again, the purpose of Section 3224 is to prevent the withholding of the tax when due and the consequent embarrassment to the Government from a delayed revenue. But the

Government will never get one dollar from this twenty cents per bushel tax imposed upon future trading. With wheat now selling in the market \$1.00 a bushel, and corn 46 cents a bushel, and oats 31 cents a bushel (Rec., p. —) no person can afford to make, and pay the tax upon, a single contract for future delivery of grain. The tax is, and is not intended to be, a prohibitive one, and will never produce one dollar of revenue; hence the reason for Section 3224 here fails. The other statutory remedy is not available to these appellants and they have no remedy except by bill and injunction.

The Solicitor General also contended that the provisions of the act requiring *members* of the exchange to make and keep memorandum of *their future sales*—Section 4 of the act—and also requiring (Section 5*b*) the Board of Trade to provide for the making and filing by it or its members of reports and records of their “cash transactions,” or “transactions for future delivery,” must be regarded as in aid of the collection of the tax on puts and calls.

It is difficult to assent to this view. The act treats puts and calls as distinct from cash transactions, or transactions for future delivery. It does not require those engaged in the business of making puts and calls to make any memorandum. Congress might undoubtedly require such traders to make memorandum of their puts and calls, as it does those making contracts for future delivery, and such memorandum respecting such puts and calls would undoubtedly aid in the collection of the tax. But how can there be provisions for memoranda respecting cash or future transactions for any such relation? The memoranda of future transactions and cash transactions are entirely different from such memoranda as are made of puts and calls.

Furthermore, only those who are engaged in the business of making, or make, puts and calls, could be required by a taxing statute to keep memoranda. Many members of the board make no puts and calls, but are engaged solely in either cash transactions or contracts for future delivery, or both. How, then, can a tax imposed upon puts and calls be aided by giving the tax collectors access to the memoranda by traders who make no puts and calls, but confine their transactions to their cash sales or future transactions, or both of them? The fact that this act has required no memorandum to be kept of transactions known as puts and calls shows that Congress thought such tax could be collected without the keeping of or access to any document.

The Solicitor General also said that the Board of Trade could go on under the burden imposed on its members by the tax. If it was here meant that members of the exchange could confine their trading to cash transactions, that is true. But if it was meant that the exchange could continue its future trading with the 20 cents a bushel tax on the future sales of members, it is not true, as was perfectly manifest by the petition of the Secretary of Agriculture presented to this Court to have modified the stay order, in order that future trading on the Chicago Board of Trade might not be stopped.

The case was argued by the Solicitor General on the theory that the regulatory features of the act were only related to the exchange itself, while Section 4 of the act expressly requires of *members* the making of memoranda which, in itself, would justify a suit by members to escape this illegal burden.

It was also suggested from the bench that, in view of recent tariff legislation, nothing short of a tax of 35 cents a bushel

on wheat could be regarded by the court as prohibitive. This overlooks the fact that this 20 cents a bushel tax is imposed not only on wheat, but on all other grains. And the bill alleges (Rec., p. 12) that up to the late war corn had never sold higher than \$1.00 a bushel, and was at present selling for 46 cents a bushel; and that oats had never sold higher than 62 cents a bushel, and at present were selling at 31 cents a bushel. Here again the petition of the Secretary of Agriculture to this Court to modify the stay order emphasizes the fact that a 20 cents a bushel tax is a prohibitive one.

The Solicitor General quoted from the speech of Senator Capper, of Kansas. A perusal of that speech will make it perfectly obvious that the purpose of the act was to regulate, and not to tax. But we had not supposed that the speech of a Senator or Congressman in support of, or in opposition to, a bill which becomes a statute could be referred to, even to interpret the act, and much less to aid this Court in determining the power of Congress to enact it.

Those who were members of this Court in 1903 heard from Mr. Christy's counsel, in the case of Board of Trade *vs.* Christy, 198 U. S., 236, the same denunciatory arguments against this exchange.

They contended that the volume of future trading on this exchange was so many times in excess of the actual deliveries as to stamp it all as gambling, and a large volume of evidence was introduced by Mr. Christy's counsel in support of that contention. But this Court, speaking through Mr. Justice Holmes, and after consideration of the evidence, rejected this contention and pointed out clearly the economic value of this future trading. They who thus rail against exchanges fall into the error of thinking that the natural law of supply

and demand does not operate in this future trading. But it is difficult to see how all this has any bearing on the question of the power of Congress to enact this statute. Much more might be truthfully said in denunciation of pool-selling, lotteries, etc., but that has not been regarded as sufficient to deprive the States of their reserved power to regulate such things.

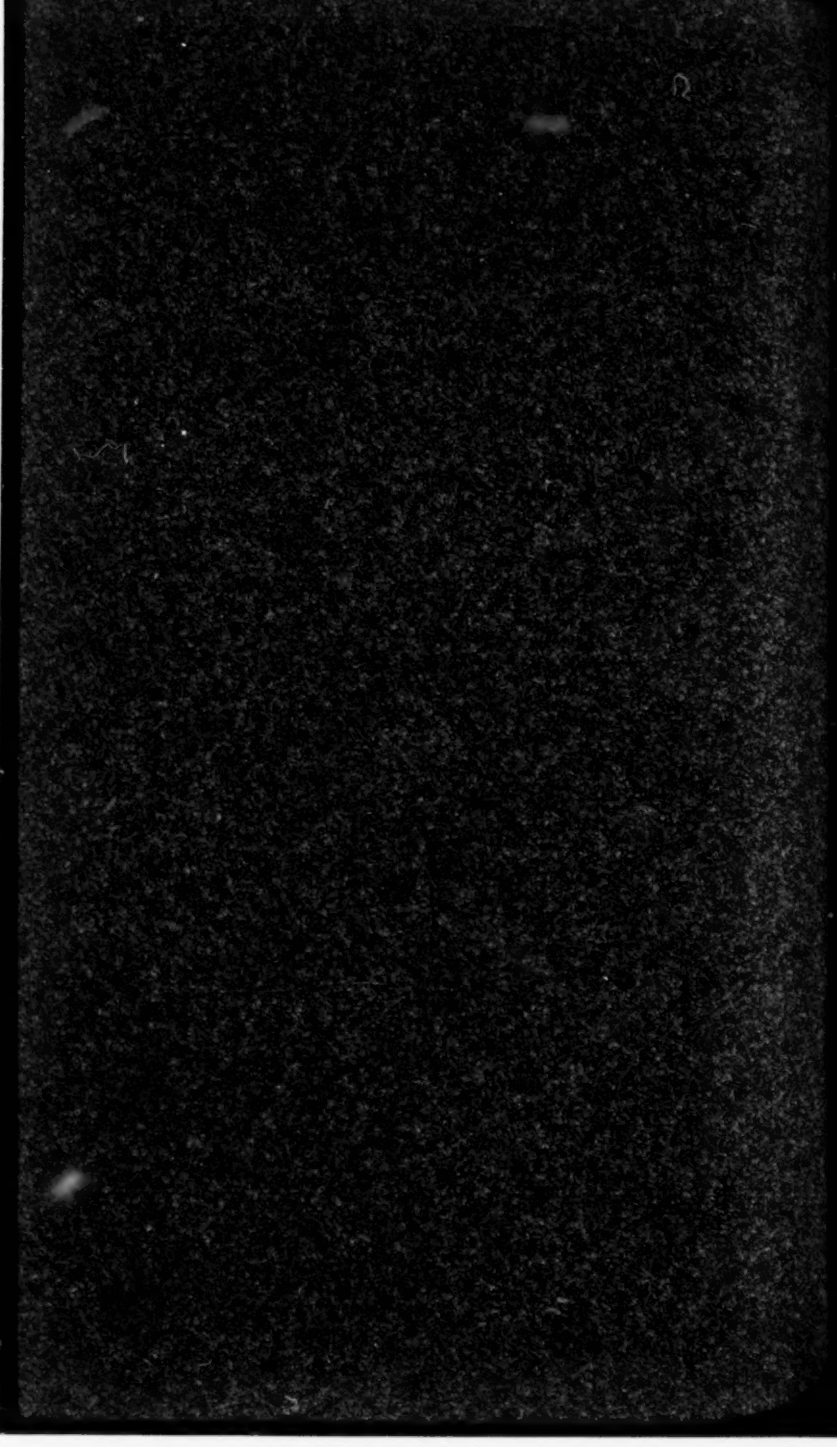
The Solicitor General bases his argument largely upon the right of Congress, in the exercise of its taxing power, to classify objects for the purposes of taxation. This right undoubtedly resides in Congress, which may undoubtedly tax sales on exchanges and leave sales elsewhere untaxed, or *vice versa*. But the right to classify is merely the right to select between different classes of *existing* objects; it does not include the power to create a class, either to tax or to exempt from taxation. As said in the License Tax Cases, 5 Wallace, 462, the power of Congress to tax "reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it."

The Solicitor General also contended that the appellants, who were merely members of an exchange, could not complain here if the governing officers of the exchange desired to qualify as a contract market. But this contention is answered on pages 29 and 30 of appellant's original brief.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

January 12, 1922.



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In the Supreme Court of the United States

OCTOBER TERM, 1921.

JOHN HILL, Jr., ET AL., APPELLANTS,
v.
HENRY C. WALLACE, SECRETARY OF
Agriculture, et al., appellees.

} No. 616.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

STATEMENT.

The general question is the constitutionality of the act of Congress approved August 24, 1921, known as "The Future Trading Act."¹

The Board of Trade of the City of Chicago is a corporation organized under a special charter granted by the State of Illinois, February 18, 1859.²

On October 18, 1921, eight persons, somewhat vaguely and indefinitely described, requested the board of directors to cause the Board of Trade to institute a suit to have The Future Trading Act adjudged unconstitutional. The board of directors

¹ Appendix A.

² Appendix B, Laws of Illinois, 1859, p. 13.

who had full power to determine the policy of the corporation (Appellants' brief, 5) refused to comply with the request, giving as a reason that they feared to antagonize public officials, and stating that they intended to comply with the provisions of the act. The eight persons thereupon filed a bill naming as defendants the Board of Trade of the City of Chicago, a corporation; Joseph P. Griffin, president and director; James J. Fones and Theodore E. Cunningham, vice presidents and directors, and fifteen other directors; and John R. Mauff, secretary of the corporation; Henry C. Wallace, Secretary of Agriculture; David H. Blair, Commissioner of Internal Revenue; Charles F. Clyne, United States attorney; and John C. Cannon, collector.

The bill does not specifically allege that the complainants are all members of the Board of Trade. The opening allegation is "Your orators, * * * bring this, their bill of complaint in their own behalf (and in behalf of all other members of the Board of Trade of the city of Chicago who may wish to join therein or share in the relief granted herein)." The allegation in paragraph 14 of the bill (Tr. 14) of the effort made by complainants to secure action on the part of the managing directors indicates that in invoking the jurisdiction of the District Court, the complainants sought to avail themselves of Equity Rule 27, promulgated by this court November 14, 1912, viz:

. STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

The particular complainant who verified the bill does not swear that he is a member of the Board of Trade, a stockholder, or anything; nor does he swear that the suit is not a collusive one to confer jurisdiction on the district court; nor does he set forth with particularity the nature of the demand the complainants made on the officers and directors and the causes of their failure to obtain such action.

This bill alleges that the "chief purpose and function (of the Board of Trade) is to provide an exchange room where its members may meet daily between certain market hours and make with each other contracts for the purchase and sale of grain and other

products of the farm, and also to prescribe and enforce rules respecting the terms of such contracts and enforce, by disciplinary proceedings when necessary, compliance by its members with their said contracts, and for the settlement of disputes arising between its members out of their trades * * *." (Tr. 5.)

The eight persons seek to enjoin the Secretary of Agriculture and the other Government officials from cooperating with the corporation, its officers and directors, and to enjoin the latter from cooperating with the Secretary and the other Government officials, to put in full force and effect all of the terms and provisions of the act. They seek, although only a very small minority of the corporation, to substitute their opinion as to its true policy for that of the governing body. There is no controversy between the Government and the Board of Trade and its officers and directors.

It is significant that the defendants, the Board of Trade of the City of Chicago, as a corporation, and all of its officials and directors, as individuals, filed their joint motion to dismiss the bill for want of equity. Their refusal to bring the suit and their quick motion to dismiss the bill against them is conclusive that they accept, on behalf of the corporation, themselves and the public, The Future Trading Act as legal and beneficial. The bill was promptly dismissed.

The Chicago Board of Trade, in an attempt to comply with The Future Trading Act, has already

adopted substantial amendments to its rules and applied for designation as a contract market. On December 21, 1921, the Secretary of Agriculture made the designation with modifications and conditions to conform to the injunction order of this court issued December 12, 1921.¹

ARGUMENT.

I.

THE HISTORY OF "TRADING IN FUTURES" PRIOR TO THE ENACTMENT OF THE STATUTE.

"Trading in futures" transactions and the evils attendant thereupon are subjects with which both legislative and judicial bodies have long been familiar. If extraneous light for the proper interpretation of the statute is helpful, the "history of the times" or "the environment at the time of the enactment of a particular law—that is, the history of the period when it was adopted"—may be resorted to. (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 463; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co. v. United States*, 221 U. S. 1, 50; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238).

In *Chicago Board of Trade v. United States* (246 U. S. 231, 238) this court, speaking through Mr. Justice Brandeis, said:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even

¹ Appendix C, Application of Board of Trade, and designation and certificate of Secretary of Agriculture.

destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

**A. REPORT OF THE FEDERAL TRADE COMMISSION TO THE CONGRESS
ON THE GRAIN TRADE.**

PRESIDENT WILSON, on February 7, 1917, addressed a communication¹ to the chairman of the Federal Trade Commission, wherein, among other things, he said:

It has been alleged before committees of the Congress and elsewhere that the course of trade in important food products is not free, but is restricted and controlled by artificial and illegal means. It is of the highest public concern to ascertain the truth or falsity of these allegations. No business can be transacted effectively in an atmosphere of suspicion. If the allegations are well grounded it is necessary that the nature and extent of the evils and abuses be accurately deter-

¹ Report of Federal Trade Commission on the Grain Trade, Sept. 15, 1920, Vol. I, Country Grain Marketing, p. 315.

mined, so that proper remedies, legislative or administrative, may be applied. If they are not true, it is equally essential that the public be informed, so that unrest and dissatisfaction may be allayed. In any event, because of the grave public interests which the food supply affects, the efficient performance of the duties imposed upon agencies of the Government requires that all the pertinent facts be ascertained. To this end the powers of such agencies should be made adequate, if in any respect they are now deficient.

Pursuant to the authority conferred upon me by the act creating the Federal Trade Commission, therefore, I direct the commission, within the scope of its powers, to investigate and report the facts relating to the production, ownership, manufacture, storage, and distribution of foodstuffs and the products or by-products arising from or in connection with their preparation and manufacture; to ascertain the facts bearing on alleged violations of the antitrust acts, and particularly upon the question whether there are manipulations, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law or the public interest.

On September 15, 1920, the commission submitted to the Congress of the United States a full report entitled "Future Trading Operations in Grain." In that report, under the heading "Legal status of future trading" (p. 272), the term "gambling" is defined and described, with the statement that a discussion of the legal status of future trading "involves

the consideration, among other questions, of what constitutes gambling." ²

B. THE SENATE COMMITTEE REPORT.

The Committee on Agriculture and Forestry of the Senate, after prolonged hearings at which an array of witnesses testified and much documentary evidence was offered, on July 8, 1921, submitted its report to the Senate on the bill for taxing contracts for sale of grain for future delivery, etc. *Inter alia*, the report states (67th Cong., 1st Sess., Sen. Rep. No. 212):

It is believed that this bill will, by wiping out obvious abuses that are practiced on the grain exchanges, result in more stable markets, and thereby enable the producers to secure more nearly the market price for their grain than has been possible in the past.

The purpose of this bill is to correct some practices on the grain exchanges and to authorize supervision of the grain-futures markets, but not to disturb any of their legitimate and useful functions. It will not put any curb upon free and unlimited hedging by elevator companies, exporters, millers, and other manufacturers of grain products. Its only purpose is to eliminate from the market some of the undesirable practices of professional speculators.

Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures

² Copies of this report will be separately distributed for the use of the members of the court.

market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating, and not a stable, market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to the best advantage. A market without wide and frequent price fluctuations would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed when buying in the country. Also, when prices are fluctuating as they have done for several months past consignments of grain from country points to the terminal markets are more likely to find the bottom price of the day's range than the top. Fluctuations benefit the scalper, whether in the pit or at the cash grain tables, but work against the producer.

Furthermore, manipulation on the "short" or selling side of the market by big speculators, and "bear raids" by their followers, such as happen every year shortly before or immediately following harvest, play directly into the hands of European importers, who are enabled to buy millions of bushels of wheat in the futures market at a reduced price, which they later exchange for cash wheat.

In addition to curbing excessive speculation and manipulation, the bill authorizes the

Secretary of Agriculture to provide means to prevent members of the exchanges from disseminating false and misleading reports on the market or on crop conditions. This in itself will be a check on the activities of professional speculators and tend to stabilize prices by curbing fluctuations caused by sensational reports.

C. PROCEEDINGS IN THE SENATE.

On August 9, 1921, the Senate, as a Committee of the Whole, resumed the consideration of the bill taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.

SENATOR CAPPER, who had charge of the bill before both the committee and the Senate, made a full statement concerning the bill immediately preliminary to its passage.³

SENATOR CAPPER, in explaining the purpose of the bill, said (Ap. D, p. 77):

The purpose of this bill, Mr. President, is to correct some of the evil practices of the professional speculators on the grain exchanges and to authorize supervision of the grain-futures markets, but not to disturb any of their legitimate and useful functions. It will not put any curb upon free and unlimited hedging by elevator companies, exporters, millers, and other manufacturers of grain products.

³ Appendix D, statement of Senator Capper, Aug. 9, 1921 (Cong. Rec., vol. 61, pp. 5220-5227, 67th Cong., 1st sess., Aug. 9, 1921.)

Briefly summarized, the evils in the marketing system which this bill undertakes to correct are:

- (a) Market manipulation by large operators.
- (b) Promiscuous and unrestricted speculation in foodstuffs.
- (c) Dissemination of false crop information.
- (d) Gambling in indemnities or "puts" and "calls."
- (e) Arbitrary interference with law of supply and demand.

That these evils exist and should be eliminated is not challenged. They all grow out of dealings in futures. The bill does not touch any transaction in cash grain, for it is expressly provided in the definition section that it shall not include any cash grain or deferred shipment.

The plan of the legislation for correcting the evils is that future transactions shall be engaged in only on certain boards of trade, as, in fact, they now are. It then places the duty upon the boards of trade to correct the evils. It does not tell them how to do it. Their past experience has shown that they know how to do it. Their representatives agree that they will undertake to do it, and really all the legislation does is to compel them to do, under supervision of the Secretary of Agriculture, that which they say they ought to do and ought to have done a long while ago.

Every reasonable suggestion for safeguarding the machinery of the trade has been incorporated in the bill now before the Senate.

SENATOR CAPPER, in explaining the magnitude of the volume of trading in futures, further said (Ap. D, pp. 83, 97):

The extent and completeness of its system for rounding up suckers explains how the Chicago Board of Trade must "sell" more grain every year than the entire globe produces. Approximately from eighteen and a half to twenty billion bushels of grain are sold at Chicago annually at a value ranging from fifteen to more than twenty billions of dollars.

The private-wire houses reap fortunes from the gambling in futures. A single house will in three days sell as much grain as can be delivered on the futures market in a year. When their wires are not otherwise engaged, they are used for transmitting faked or exaggerated statements of market conditions to get the little fellows into the game for the sake of the commission revenue.

Mr. President, the small gambler in futures has no more chance to win than the small gamester in a gambling house where they use marked cards and loaded dice.

In its constant search for victims to play the market the Chicago Board of Trade does more fishing than goes on in all the Seven Seas. Every week day it casts its net over the United States and Canada. Every night it is drawn in. You can hardly imagine the extent of the catch. Some recent instances are impressive.

* * * * *

The Federal Trade Commission, in its recently published report, finds that future trad-

ing in grain amounts some years to more than 20,000,000,000 bushels, or three times all the grain produced in the world, while the actual amount of grain which changes hands at Chicago, where five-sixths of this trading is done, is a small fraction of 1 per cent of these billions of bushels. Transactions last year amounted to fifty-one times the amount of wheat produced in the United States.

That the abuses of the present marketing system should be corrected is not even open to dispute. It is the claim of representatives of the grain business that their correction should be left to the boards of trade themselves without any legislation. It is interesting to note, however, that in hearings before the committee of the House of Representatives 12 years ago, when a similar bill was before that committee, the representatives of the boards of trade admitted then, as they do now, the existence of abuses, but claimed then, as they do now, that the correction should be left to the boards themselves. During the 12 intervening years very little has been done to correct the abuses.

C. THE OPINIONS OF THE COURTS.

The court has long been familiar with the organization of the Chicago Board of Trade and its methods of transacting business. (*Nicol v. Ames*, 173 U. S. 509; *Clews v. Jamieson*, 182 U. S. 461; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236; *Chicago Board of Trade v. United States*, 246 U. S. 231.) The Supreme Court of Illinois has frequently considered the same subjects. (*Pickering v. Cease*,

79 Illinois, 328; *Lyon v. Culbertson*, 83 Illinois, 33; *Pearce v. Foote*, 113 Illinois, 228; *Cothran v. Ellis*, 125 Illinois, 496; *New York & Chicago Grain and Stock Exchange v. Board of Trade*, 127 Illinois, 153; *Schneider v. Turner*, 130 Illinois, 28; *Soby v. People*, 134 Illinois, 66; *Central Stock Exchange v. Board of Trade*, 196 Illinois, 396; *Weare Commission Co. v. People*, 209 Illinois, 528, affirming 111 Ill. App. 116; *Board of Trade v. Dickinson*, 114 Ill. App. 295.)

II.

THE PRESUMPTION OF VALIDITY.

In *Nicol v. Ames* (173 U. S., 509, 514) this court sustained the validity of certain provisions of section 6 and a portion of Schedule A, therein referred to, of the act of Congress approved June 13, 1898 (c. 448, 30 Stat. 448, 451, 458), entitled "An act to provide ways and means to meet war expenditures, and for other purposes," commonly spoken of as the War Revenue Act. That act provided a tax "upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent." Mr. Justice Peckham, speaking for the court, said:

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United

States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare, and the only constitutional restraint upon the power is that all duties, imposts, and excises shall be uniform throughout the United States, and that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any State. (Constitution, art. 1, sec. 8 and sec. 9, subdivisions 4 and 5.) As thus guarded, the whole power of taxation rests with Congress.

III.

THE VALIDITY OF THE STATUTE.

A. THE MOTIVES OF CONGRESS IN LAYING THE TAX AND FIXING THE AMOUNT OF IT MAY NOT BE INQUIRED INTO.

1. This court has repeatedly said that it will not inquire into the motives of Congress.

McCray v. United States (195 U. S. 27, 59):

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

Hammer v. Dagenhart (247 U. S. 251, 276):

We have neither authority nor disposition to question the motives of Congress in enacting this legislation.

Treat v. White (181 U. S. 264, 269):

The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

Fletcher v. Peck (6 Cranch. 87, 130, 131):

The judiciary can not investigate the motives of the legislature even when bribery and corruption are alleged. (See also *Veazie Bank v. Fenno*, 8 Wall. 533; *Ex parte McCardle*, 7

Wall. 506, 514; *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 541; *Calder v. Michigan*, 218 U. S. 591, 598; *Weber v. Freed*, 239 U. S. 325, 330; *Caminetti v. United States*, 242 U. S. 470; *Hoke v. United States*, 227 U. S. 308; *Lottery Cases*, 188 U. S. 321.)

It should be observed that in the last cited case the commerce power was used to discourage gambling in lotteries as the taxing power is now used to discourage gambling in the greatest staple of commerce.

2. The fact that the tax may be burdensome even to the extent of causing the discontinuance of the particular business affected will not influence the court in reaching its judgment. Complaints against the tax on that ground should be addressed to Congress.

Patton v. Brady (184 U. S. 608, 623):

It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed.

Spencer v. Merchant (125 U. S. 345, 355):

The judicial department can not prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.

Alaska Fish Co. v. Smith (255 U. S. 44, 48):

Even if the tax should destroy business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk.

B. THE PROVISION FOR ADMISSION TO MEMBERSHIP IN THE BOARD OF TRADE OF A REPRESENTATIVE OF A COOPERATIVE ASSOCIATION IS NOT A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Future Trading Act does not compel admission to membership. The requirement of admission arises only upon the voluntary, affirmative act of the board of trade in applying for designation as a contract market, thus obtaining in the classification of taxes the benefit of an exemption, and it is then a matter of contract between the board and the Government. There is no compulsion upon the board to apply for designation. If it applies, it does so of its own volition for the purpose of escaping the tax and because, in consideration of relief from the tax, it is willing to comply with the conditions incident to designation. Also, there is no compulsion upon any member of the board to retain his membership on the board. He is free to dispose of it at any time that he becomes dissatisfied with the board's conduct. As to the board, if payment of the tax is preferable to designation and the burdens incident thereto, it is entirely free to make that choice and is then under no obligation to admit to membership. And as to the individual member, if payment of the tax is preferable to doing business under the requirements of a contract market, he is free to dispose of his membership on the board to whomsoever he will—to one of

the associations, if he wishes—and to trade either independently of the board or by or through its members.

It is by no means certain that the value of memberships will be depreciated by the requirement of admission. It may be that the increased demand incident to this provision will enhance the value in accordance with the general rule of supply and demand. It is usual when a commodity is open to a new line of purchasers for it to increase in value because of the consequent increased demand. The board of trade apparently does not believe that the value of memberships will be impaired because it appears from the bill that it refused to institute a suit at the request of the appellants and advised them that it intended to comply with the act. (Tr. 14.) Apparently, therefore, they do not believe that such admission to membership will have the result claimed by the appellants. They desire to obtain the benefit of the exemption and as the corporation has vested full power in them, neither a majority, much less a small minority of the members, can prevent them. (Ap. C, 70, amendment to rules.)

The use of the Board of Trade Building by representatives of cooperative associations which may be admitted to membership will not take the property of the board or its members without due process of law. The act does not specify the details under which such representatives are to be admitted to membership. It must be given a construction which will uphold it, if possible. It is clearly susceptible

of a construction that will uphold it, namely, as requiring that the applicant shall either pay the initiation fee or purchase the membership. The substance of this provision is that an exchange can not refuse admission to a cooperative association upon any unreasonable ground or because of its distributing its earnings among its bona fide members. It is only fair to assume that the board fixed the initiation fee to cover the privileges incident to membership, including the use of its buildings or other property. Consequently, when such fee is paid, there can be no taking of property without due process. Also, upon the purchase of an existing membership, the purchaser acquires all the privileges incident thereto, including the use of the property of the board.

There is no taking of the property of the board or its members for public use. The act merely requires that as a consideration for the remission of the tax the board shall admit cooperative representatives to membership, but, as above pointed out, this must be upon substantially the same terms as others are admitted, namely, the payment of the initiation fee or the purchase of an existing membership. Also, neither is the board compelled to seek designation nor the individual member to remain in the board if it does seek designation. Hence, any loss that may accrue to either the board or the individual member is the result of a voluntary act on the part of the board or the member in return for a consideration.

Under the present rules of the board of trade, a corporation, while not admissible to membership,

may have two of its officers and stockholders admitted and trade on the exchange through them. (Appellants' brief, 23.) There is no limit to the number of corporations which may be thus admitted and there is no limit to the number of stockholders that a corporation may have. The earnings of these representatives are, of course, the property of the corporation and are distributed among its stockholders in accordance with the amount of stock owned by each. There is no legal difference between the admission of such representatives and the admission of representatives of cooperative associations. The membership in each case is unlimited and the earnings are distributed among the membership by similar methods. We fail to see, then, how the admission of a representative of a cooperative association can be any more injurious to the board of trade or its members than the admission of representatives of a corporation.

The Future Trading Act applies with uniformity. The tax is not laid on either persons or property. The tax is on the privilege of dealing in grain. The amount of the tax is measured by the number of bushels involved in the transaction. There is no classification as between dealers and growers, or as between dealers who actually own grain and dealers who do not. It is a classification of transactions. If the transaction is one in which the seller owns the grain, or there is a fair and reasonable probability that he will produce it before delivery date—that is, if he is the grower or the owner or renter of land on which the grain is to be grown—it is not taxed; but

if the transaction is one in which the seller is not such grower, owner, or renter the transaction is taxed. It is obvious that any dealer can bring his transaction within the exemption by becoming such owner, grower, or renter before he enters into the contract of sale. Also, a dealer may be taxed as to some transactions and not as to others, depending upon his status in this regard at the time of the sale. Hence, the act operates alike upon all persons in like circumstances, and does not make a distinction as between persons.

In making classifications and discriminations for taxing purposes, the legislature is allowed a wide latitude, and these are always upheld if reasonable and not arbitrary. In making such classification, the taxing power has always taken into account moral, economic, or social considerations. Thus the power to tax is used for the "general welfare." A discrimination of producers against dealers would be in accordance with discriminations which have been upheld by this court.

The Future Trading Act is essentially a taxing statute. This is not less so even if the court assumed that the tax was prohibitive, but there is nothing before the court which would justify the belief that the tax is prohibitive. The provisions of the statute, other than that which imposes the tax, are merely a method of classification. The power to classify subjects for taxation, in order to determine when the tax is imposed and when it is not, is certainly as great, and in my judgment *ex necessitate rei*, it is greater

than the like power of classification in the exercise of any other constitutional power. This being so, the propriety of the classification in this instance is justified in the case of *Lewis Publishing Company v. Morgan*, 229 U. S., 288.

That case arose under the Federal power over the mails, and in classifying first and second class mailing matter it was provided that a publication which did not show the names of its editors and publishers, stockholders and bondholders, the amount of its circulation, and which did not identify its editorial and reading matter from its advertisements, would not be entitled to the preferential rate.

In that case I vainly contended that it was in effect a censorship of the press, and was intended to prevent anonymity in its printed contents. That this was one of the purposes of the act could scarcely be questioned from the history of its enactment.

This court held that the classification was justifiable, and that in classifying mail matter it was within "the power of Congress in the interest of the dissemination of current intelligence to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers."

The court declined to hold that the only fact which the Congress could take in classifying the mails was the conditions of physical carriage. The court held

that if publishers desired to secure the privilege of preferential rates, it must be upon the terms which Congress would impose, and similarly we now contend that as the Government has the unquestioned power to impose a tax upon transactions in grain, if it desires to exempt any class of such transactions, it has the power to determine the conditions upon which such exemption shall be based.

In *McCray v. United States* (195 U. S., 27, 61, 62) discrimination in favor of butter producers as against oleomargarine manufacturers made by the oleomargarine statute was sustained.

In *American Sugar Refining Co. v. Louisiana* (179 U. S. 89, 92) a discrimination in favor of "planters and farmers grinding and refining their own sugar and molasses" as against persons and corporations engaged in the business of refining sugar and molasses, was sustained. In delivering the opinion Mr. Justice Brown said:

The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this Government not only to classify for purposes

of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves, or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth.

In *Flint v. Stone Tracy Co.* (220 U. S. 107, 158) a statute taxing corporations but exempting a partnership or private individual in the same business was sustained. In delivering the opinion Mr. Justice Day said:

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible

subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see cases in the margin decided in this court, upholding the power.

In *German Alliance Insurance Co. v. Kansas* (233 U. S. 389, 418) a statute regulating the rates of insurance companies but excepting farmers' mutual insurance companies insuring only farm property was sustained. In delivering the opinion Mr. Justice McKenna said:

A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense; that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. (*Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251.) There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we can not say is outside of the constitutional power of the legislature. (*Orient Ins. Co. v. Daggs*, 172 U. S. 557.)

In *Rast v. Van Deman*, 240 U. S. 342, 357 (Trading Stamp Case), the legislature of Florida, under the taxing power, required all merchants conducting business with the use of trading stamps to procure licenses and to pay therefor license taxes which were

alleged to be prohibitory, with the result that the merchants were compelled either to abandon the use of the trading stamps or discontinue the business. Injunction was issued and an appeal taken to this court. In reversing the decree, Mr. Justice McKenna, speaking for this court, said:

The ground of discrimination, simply and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the court to arbitrate in such contrariety. *Chi., Burl., & Quincy R. R. v. McGuire*, 219 U. S. 549; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 413, 414; *Price v. Illinois*, 238 U. S. 446, 452.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank v. Rich-*

mond, 226 U. S. 137, 142; *Sligh v. Kirkwood*, 237 U. S. 52, 59. And, we repeat, "it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." *Quong Wing v. Kirken-dall*, 223 U. S. 59, 62, and the cases cited above (240 U. S. 357).

* * * *

A lottery of itself is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. All participants in it have an equal chance; there is no admonishing caveat of one against the other. And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency. *Murphy v. California*, 225 U. S. 623.

But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. * * *

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt

by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a "lottery," may not be called "gaming"; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chic., Burl. & Quincy R. R. v. McGuire and German Alliance Ins. Co. v. Kansas, supra.* And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation. *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126, 127. See also *Munn v. Illinois*, 94 U. S. 113, 132.

But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. * * * *Otis v. Parker*, 187 U. S. 606, 608, 609.

That case illustrated the reach of the power of government to protect or promote the general welfare. It sustained a provision of the constitution of the State of California which made void all contracts for the sale of the

stock of corporations on margin or to be delivered at a future day. The practice had been common, its evil was disputed. It was attempted to be justified by argument very much like those advanced in the case at bar, but this court decided that the legislative judgment was controlling (240 U. S. 364, 365, 366).

In *Tanner v. Little*, 240 U. S. 369, 382 (Trading Stamp Case), the legislative act required merchants furnishing, selling or using trading stamps to obtain a license from the auditor of each county for the privilege, and to pay for such license the sum of \$6,000, which was alleged to be prohibitory. The District Court issued an injunction and the State appealed. In reversing the decree, and following *Rast v. Van Deman*, *supra*, this court, speaking through Mr. Justice McKenna, further said:

Classification is not different in law than in other departments of knowledge. "It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those particulars.'" *Billings v. Illinois*, 188 U. S. 97, 102. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men and the

classifications would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject matter is hence to be considered. It may not make the distinction adverted to but it may make others the appropriateness of which, considered logically, may be challenged, for instance: between sales of stock upon margin or for immediate or future delivery (*Olis v. Parker*, 187 U. S. 606); between acts directed against a regularly established dealer and one not so established (*Central Lumber Co. v. South Dakota*, 226 U. S. 157); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (*St. Louis Cons. Coal Co. v. Illinois*, 185 U. S. 203); and a like distinction in a workmen's compensation law (*Jeffry Mfg. Co. v. Blagg*, 235 U. S. 571); between a combination of purchasers and a combination of laborers (*International Harvester Co. v. Missouri*, 234 U. S. 199); between residents and nonresidents (*Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and roads of that length or less (*N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628; see also *Dow v. Beidleman*, 125 U. S. 680; *Postal Telegraph Co. v. Adams*, 155 U. S. 688); between theatres according to the price of admission (*Metropolis Theatre Co. v. Chicago*, 228 U. S. 61); between landowners as to liability for permitting certain noxious grasses to go to seed on

the lands (*Missouri, Kansas & Texas Ry. v. May*, 194 U. S. 267); between businesses, in the solicitation of patronage on railroad trains and at depots (*Williams v. Arkansas*, 217 U. S. 79); and a distinction based on the evidence of the qualifications of physicians (*Watson v. Maryland*, 218 U. S. 173, 179).

Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction was in the interest of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject matter, and having proper bases of community.

In *Alaska Fish Co. v. Smith* (255 U. S. 44, 48, 49) a discrimination against fertilizer and fish oil made from herring as against such products made from other fish was sustained. In delivering the opinion Mr. Justice Holmes said:

We are content, however, to assume for the purposes of decision that, not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly

can be said to be contravening a Constitution that has known protective tariffs for a hundred years. (*Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357.) Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. (*McCray v. United States*, 195 U. S. 27; See *Quong Wing v. Kirkendall*, 223 U. S., 59; *Mugler v. Kansas*, 123 U. S. 623; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482.)

* * * *

The requirement of uniformity in section 9 is disposed of by what we have said of the classification when considered with reference to the Constitution. The legislature was warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal. The provisions against taxing in excess of one per centum of the assessed valuation of property does not apply to a license tax like this. This is not a property tax. (*Alaska Pacific Fisheries v. Alaska*, 236 Fed. Rep. 52, 61.)

Precedents for the classification made by The Future Trading Act are found in other statutes, the constitutionality of which has been upheld by this court. The oleomargarine statute taxes colored oleomargarine ten cents a pound and uncolored one-fourth of a cent a pound, but imposes no tax whatever on butter, notwithstanding that a large per-

centage of the butter sold is colored artificially. The same oleomargarine which, without color, is taxed one-fourth of a cent a pound, if colored, is taxed ten cents a pound. The addition of the coloring matter does not affect the wholesomeness of the product in the slightest degree. It has exactly the same food value with as without the coloring matter.

The statute taxing sugar refineries excepted farmers and planters grinding and refining their own molasses. All were engaged in the same business and produced the same article, but one was taxed and the other was not.

The statute laying a tax on State bank notes did not tax the notes of national banks.

The phosphorous match statute lays a tax on phosphorous matches but not on other matches.

The Revenue Act of 1898 taxes sales on boards of trade but not sales made elsewhere.

The Future Trading Act taxes (1) puts and calls, etc., which are not contracts, but merely options for contracts, and (2) all contracts of sale of grain for future delivery except (a) those made by the owner or grower and (b) those made by or through a member of a board of trade designated as a contract market. This classification is as clearly and reasonably drawn as that made by any one of the statutes above mentioned.

C. THE TAX IS NOT A DIRECT TAX UPON THE PROPERTY BUT A TAX ON THE PRIVILEGE OF SELLING THE PROPERTY FOR FUTURE DELIVERY.

The only restrictions upon the taxing power of Congress are that direct taxes must be laid and collected by the rule of apportionment (Art. I, sec. 2, clause 3), and that duties, imposts, and excises must be uniform throughout the United States (Art. I, sec. 8, clause 1).

The tax imposed by The Future Trading Act is not a direct tax upon the property. It is a tax upon the privilege of selling the property for future delivery. If no such sale is made, no tax accrues. It therefore is not a direct tax, but an excise or duty levied upon contracts of sale of grain for future delivery.

Nicol v. Ames (173 U. S. 509, 519, 520):

We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges, for the transaction of the business mentioned in the act. * * * This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or the board of trade.

Thomas v. United States (192 U. S. 363, 371):

The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the

happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class (duties, imposts, and excises) of the forms of taxation.

The uniformity required as to duties, imposts and excises is geographical.

Knowlton v. Moore (178 U. S. 41, 106):

By the result, then, of an analysis of the history of the Constitution, it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic, but simply a geographical, uniformity.

The tax laid by The Future Trading Act is uniform throughout the United States and therefore within the constitutional requirement.

For a hundred years the use of the taxing power has not been limited to the raising of revenue alone, but, through the protective tariff, has been employed to encourage industries in this country. In the application of the tariff, Congress has looked to the "general welfare" of the country, as is done in the case of The Future Trading Act, and not merely to the raising of revenue. In laying a tax, Congress necessarily uses discretion, imposing the burden upon those objects which are least useful or valuable to the public, or perhaps even hurtful to its interests, thereby aiding and encouraging those objects which are of greater use or value to the public. The use of the taxing power to promote the moral welfare of the nation—as the heavy duties on liquors or tobacco—is as old as the taxing power. The tax im-

posed by The Future Trading Act puts the burden upon the least necessary and perhaps the harmful transactions affecting the grain market of the country, and at the same time provides for the making of the transactions necessary to the growers and users of grain. It places a substantial tax on the purely gambling transactions, to wit, puts and calls, etc., but permits unrestricted dealing in cash grain and, to a limited extent, futures throughout the country, and in futures generally, under reasonable conditions, at the important terminal markets. Even though the tax may be heavy enough to cause discontinuance of the present manner of conducting the business, still a reasonable method of preserving the business, and one which Congress believes is for the public welfare, is provided. The price of cash grain is influenced by quotations on the future markets. If, for reasons peculiar to exchange methods and transactions, the price of futures is depressed unduly, as frequently happens, by conditions not in anywise connected with the total available supply of grain or the demand therefor, an indefensible, economic and commercial condition arises, harmful to all persons owning or dealing in cash grain, including not only the farmer, but the grain merchant as well. That the taxing power may be used in this way is well settled.

Bell's Gap R. R. Co. v. Pennsylvania (134 U. S. 232, 237):

We think that we are safe in saying that the Fourteenth Amendment was not in-

tended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.

In *Alaska Fish Co. v. Smith* (255 U. S. 44, 49) this court upheld the laying of a tax for discouraging the use of an article for a purpose not deemed for the best interests of the public, and said:

The acts must be judged by their contents, not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like, as in *Postal Telegraph-Cable Co. v. Taylor* (192 U. S. 64, 72).

D. THE FUTURE TRADING ACT IS NOT WITHOUT PRECEDENT.

The United States Cotton Futures Act of August 11, 1916 (39 Stat. 446, 476), lays a tax of two cents a pound on every contract of sale of cotton for future

delivery, but provides that the tax shall not be levied upon any contract of sale if it complies with specified conditions.

The United States Warehouse Act of August 11, 1916 (39 Stat. 486), provides for the issuance of a Federal license to any warehouseman who will agree to comply with the requirements of the act and the regulations thereunder. The regulatory features of these acts arise out of a contractual relation between the applicant and the Government and are, as in the case of The Future Trading Act, wholly permissive.

The Cotton Futures Act, as originally enacted on August 18, 1914 (38 Stat. 693), was attacked as unconstitutional in *Hubbard v. Lowe* (226 Fed. Rep., 135, 137) upon the grounds (1) that it made an unlawful discrimination and (2) that, being "a bill for raising revenue," it should have originated in the House instead of in the Senate. It was held unconstitutional on the latter ground. In that case the court said:

For every reason, therefore, it seems best to first consider the objection to this statute based upon the statement that it is a bill for raising revenue originating in the Senate, and if that objection be "good beyond rational doubt" (*International Mercantile Marine Co. v. Stranahan* (C. C.), 155 Fed. 428), to go no further. I am perhaps saved from inquiry whether the Cotton Futures Act is a "bill for raising revenue" by the agreement of counsel on this point. They have all asserted that, though every one who has studied the investigations, reports, and

discussions preceding and producing the passage of the act knows that nothing was further from the intent or desire of the lawmakers than the production of revenue, nevertheless the result of their efforts is a revenue bill within the constitutional meaning.

The law was reenacted on August 11, 1916 (39 Stat. 446, 476), and its constitutionality has not since been questioned. The cotton exchanges elected to comply with it rather than pay the tax. No question has been raised as to the validity of the United States Warehouse Act.

The supertax is not a new device in the history of our legislation. It was as long ago as 1866 applied to the circulation of State bank notes (14 Stat. 146); in 1886, to the sale of artificially colored oleomargarine (24 Stat. 209; 32 Stat. 193), and in 1912, to the manufacture of phosphorous matches (37 Stat. 81). The first of these statutes was sustained in *Veazie Bank v. Fenno* (8 Wall. 533), and the second in *McCray v. United States* (195 U. S. 27).

Mr. Story is the eminent authority for the view that the taxing power of Congress is not limited to the purpose of raising revenue. In his work on the Constitution, after referring to the several views of the taxing power, he says:

SEC. 973. So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustained, that the power to lay taxes is not by the Constitution confined to purposes of revenue. In point of fact, it has never been limited to such purposes by Con-

gress; and all the great functionaries of the government have constantly maintained the doctrine that it was not constitutionally so limited.

In a preceding section he also says:

SEC. 965. The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this absolute form (as it was, in fact, when reported in the first draft in the convention), there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural

product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the Government.

The title is of very little importance in the construction of an act of Congress and is resorted to only in case of ambiguity. *Hadden v. Collector* (5 Wall. 107, 110); *United States v. Union Pacific* (91 U. S. 72, 82); *Goodlet v. Louisville* (122 U. S. 408); *Patterson v. Eudora* (190 U. S. 169); *Cornell v. Coyne* (192 U. S. 418); *Wm. Cramp & Sons v. Curtis Turbine Co.* (246 U. S. 28).

There is no ambiguity in the Future Trading Act. It consists of two separate and distinct provisions, one, the laying of a tax, and the other, the means of avoiding it. To escape the tax, specified conditions must be observed. But compliance with these conditions is voluntary, not compulsory. There is no room for an argument that the sole purpose of the act is to regulate the grain exchanges and not to raise revenue. The tax feature of the act can stand even though its other features fall, and vice versa.

Congress, by the United States Warehouse Act of August 11, 1916 (39 Stat. 486), provided for the issuance of Federal licenses to warehousemen who agree to conduct their warehouses in accordance with specified requirements. Numerous licenses have been applied for and issued under that act. The consideration to the warehouseman is the advantage accruing to him from the fact that his warehouse is inspected and his business supervised by the Federal

Government. In return for this, he agrees to comply with the provisions of the act. There can be no question as to the constitutionality of the warehouse act.

Congress could lay a tax on the privilege of doing a warehouse business and except warehouses operated under Federal license. The Future Trading Act does no more than this except that the two provisions—the laying of the tax and the means of avoiding it—are combined in one act.

Section 6 (b) does not go beyond the conditions imposed by the Act as an incident to designation, as upon analysis it will be seen that it also is merely one of the conditions with which the contract market must comply in order to retain its designation as such. Congress has not attempted to assume jurisdiction over the individual citizen who violates this section or to impose any direct punishment upon him, but merely says to the contract market, "You must not do business with such person, under penalty of losing your designation." The State is still left free to pass whatever legislation it desires with reference to future trading. Designation as a contract market would not authorize the board of trade or its members to violate any State law. On the contrary, they would have to comply with such law. In the event of conflict between State and Federal law, the board could apply to be undesignated as a contract market. Any failure of the board to comply with The Future Trading Act, caused by compliance with State law, might be ground for undesignating the board.

In *United States v. Doremus*, 249 U. S. 86, 92, this court sustained The Narcotic Drug Act of December 17, 1914 (c. 1, 38 Stat. 785, sec. 1) under the taxing power of Congress, and the principles laid down in that case would seem to dispense with further argument in the instant case. In delivering the opinion Mr. Justice Day said:

This statute purports to be passed under the authority of the Constitution, Article I, section 8, which gives the Congress power "To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it can not add others. Subject to such limitation Congress may select the subjects of taxation and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course, Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquiry into that subject. If the legislation enacted has some reasonable relation to

the exercise of the taxing authority conferred by the Constitution, it can not be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a State bank issue of circulating notes. *McCray v. United States*, 195 U. S. 27, where the power was thoroughly considered and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress, that is sufficient to sustain it. *In re Kollock*, 165 U. S. 526, 536.

The legislation under consideration was before us in a case concerning section 8 of the act, and in the course of the decision we said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right." *United States v. Jin Fuy Moy*, 241 U. S. 394, 402.

IV.

THE FUTURE TRADING ACT MAY READILY BE SUSTAINED AS AN ACT TO REGULATE COMMERCE.

The learned counsel for the appellants has pressed an argument to the effect that the regulatory provisions of the act are not within the commerce power of Congress, and that the board of trade, its members, etc., should all be treated as together constituting an instrumentality which is but an aid to commerce. (Br. 44.)

The learned counsel has invited an argument on the subject of commerce power. We do not concede that it is necessary for the Government to resort in the instant case to the commerce power, although it may be noted that the use of the taxing power to regulate commerce is as old as our institutions. If resort to the commerce power is essential to sustain the validity of The Future Trading Act, the material for it is readily available.

In Board of Trade v. Christie Grain & Stock Co. (198 U. S. 236, 247) Mr. Justice Holmes, speaking for the court, said:

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world.

If Congress should pass an act outlawing entirely "trading in futures" as conducted on the boards of trade in the large commercial centers, there would be legislative and judicial precedents in favor of the validity of its action.

In *Otis v. Parker* (187 U. S. 606, 609) the following provision of the constitution of California was assailed, viz:

All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.

In sustaining the validity of the provision, this court, speaking through Mr. Justice Holmes, said:

Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." (*Booth v. Illinois*, 184 U. S. 425, 429.) No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them

thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized States. (See *Ballock v. State*, 73 Maryland, 1.)

We can not say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price, he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin, he may put all his property into the venture, and, being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaste. (*Cashman v.*

Root, 89 California, 373, 382, 383.) If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in *Booth v. Illinois* (184 U. S. 425, 431), we are unwilling to declare the judgment to have been wholly without foundation.

In *Chicago Board of Trade v. United States* (246 U. S. 231), as shown by the transcript, the Government filed a petition in the District Court against the Chicago Board of Trade, its officers and directors, alleging that, when carried into force and effect by the members thereof, the following rule was in violation of the Sherman Anti-trust Act, viz:

SEC. 33. A. The board of directors is hereby empowered to establish a public "call" for corn, oats, wheat, and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.

B. Contracts may be made on the "call" only in such articles and upon such terms as have been approved by the "call" committee.

C. The "call" shall be under the control and management of a committee consisting

of five members appointed by the president with the approval of the board of directors.

D. Final bids on the "call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in, and that with such market all making of new prices by members of this association shall cease until the next business day.

E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct, and upon conviction such member shall be suspended from the privileges of the association for such time as the board of directors may elect.

In answering, the defendants, by the same distinguished counsel who appears in the instant case, made no denial whatever that the transactions were in interstate commerce. On the contrary, the counsel left unchallenged the jurisdiction of the district court and came at once to the merits of the case. In his brief filed in this court on the appeal in that case he made certain verbal criticisms of the form of the injunction decree because it "regulates intrastate trade." But that was not in any sense a challenge of the jurisdiction of the court. Throughout the brief in that case he appears to have assumed that the transactions were in interstate commerce, as he rested his case on the argument that the persons who conducted the transactions

were not engaged in a combination and conspiracy in restraint of trade and commerce in violation of the Sherman Anti-trust Act.

The opinion of this court assumes that the transactions were in interstate commerce and that the parties were engaged in interstate commerce who conducted them. There is no suggestion whatever to the contrary. If the transactions were not in interstate commerce and the parties were not engaged in interstate commerce who were conducting them, the distinguished counsel for appellants in that case who also represents the appellants in the instant case would quickly have made the point.

Moreover, that case has been cited in subsequent cases arising under the Clayton Act but never on the proposition that the transactions referred to therein were not in interstate commerce. (*Standard Fashion Co. v. McGrane Houston Co.* 259, Fed. Rep. 793, 798.)

An exchange which deals in the purchase and sale of more grain than the whole world either produces or consumes must have a very real relation to interstate and foreign commerce.

Mr. Justice Brandeis, speaking for the court, said (p. 235):

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade v. Christie Grain & Stock Co.* (198 U. S. 236). Its 1,600

members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products, and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the board from 9.30 a. m. to 1.15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.

In *Dahnke-Walker Milling Co. v. Bondurant*, No. 30, Supreme Court, October term, 1921, decided December 12, 1921, Mr. Justice Van Devanter, in delivering the opinion of the court, said:

The commerce clause of the Constitution, Article I, section 8, clause 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. (*Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519.) On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. (*American Express Co. v. Iowa* 196 U. S. 133, 143.) This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri* (91 U. S. 275, 280): "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of

commodities." In *Kidd v. Pearson* (128 U. S. 1, 20) it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In *United States v. E. C. Knight Co.* (156 U. S. 1, 13) "contracts to buy, sell, or exchange goods to be transported among the several States" were declared "part of interstate trade or commerce." And in *Addyston Pipe & Steel Co. v. United States* (175 U. S. 211, 241) the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

The President of the United States by his communication to the Federal Trade Commission first set in motion the machinery to investigate and remedy the intolerable conditions which The Future Trading Act was designed to correct. The report of the Federal Trade Commission to Congress was the link which joined the forces of the President and the Congress and resulted in further extensive hearings

before the committees of both House and Senate. Therefore, The Future Trading Act is the result of the united efforts of both the Executive and Legislative Departments of the Government, and the weight of the two is now squarely back of it.

Laden with that burden the learned counsel finds little hope for relief in the Judicial Department for in the concluding paragraph of his brief, in this the Court of last resort, he is driven to the extreme of arguing that the court should make inapplicable to section 3 its many decisions that an improper motive of Congress will not be inferred from the size of the tax alone. He further argues that he is entitled to a decree at the hands of this court that section 3 of the act, as well as the other sections, must be regarded as regulatory in character and beyond the power of Congress. In short, he asks that The Future Trading Act be adjudged unconstitutional and void in its entirety.

This court will defer a long time before it holds unconstitutional an Act of Congress based on such a history of "trading in futures" as underlies The Future Trading Act, the purpose of which was designed to correct evils in the marketing system, such as —

- (a) Market manipulation by large operators;
- (b) Promiscuous and unrestricted speculation in foodstuffs;
- (c) Dissemination of false crop information;
- (d) Gambling in indemnities or "puts" and "calls";
- (e) Arbitrary interference with law of supply and demand;

when such an act is amply justified under either the taxing power or the commerce power of the Congress, which harms no one, is designed to promote legitimate trading in many of the great necessities of life, and which will be complied with by the Chicago Board of Trade and other similar organizations the instant this court lifts its injunction order.

V.

CONCLUSION.

The preliminary injunction heretofore issued by this court should be dissolved and the decree of the District Court dismissing the bill should be affirmed.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

R. W. WILLIAMS,

Solicitor, Department of Agriculture.

FRED. LEES,

Assistant to Solicitor, Department of Agriculture.

JANUARY, 1922.

APPENDIX A.

AN ACT Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.

Be it be enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act shall be known by the short title of "The Future Trading Act."

SEC. 2. That for the purposes of this Act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. That the word "person" shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations, and trusts. That the word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

SEC. 3. That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs."

SEC. 4. That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or

(b) Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the

United States Department of Agriculture or the United States Department of Justice.

SEC. 5. That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as "contract markets" when, and only when, such boards of trade comply with the following conditions and requirements:

(a) When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be re-

quired to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility: *Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such co-operative association.

(f) When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this act.

SEC. 6. That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with

a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing. *Provided*, That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the said commission such board of trade appeals to the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified

and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further*, That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an

order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this act the provisions, including penalties, of section 12 of the Interstate Commerce Act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member

thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

SEC. 7. That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as may have been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

SEC. 8. That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least ninety days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets.

From and after the date upon which the vacation became effective, the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

SEC. 9. That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person, and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any person found guilty of violating the provisions of this act under the proceedings prescribed in section 6 of this act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of grain and grain products and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together

with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

SEC. 10. That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per centum of the tax levied against him under this act and shall be guilty of a misdemeanor, and upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 11. That if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 12. That no tax shall be imposed by this act within four months after its passage, and no fine, imprisonment, or other penalty shall be enforced for any violation of this act occurring within four months after its passage.

SEC. 13. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, tele-

phones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved August 24, 1921.

APPENDIX B.

AN ACT to incorporate the Chicago Board of Trade.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly, That* the persons now composing the Board of Trade of the City of Chicago are hereby created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago"; and by that name may sue and be sued; implead and be impleaded; receive and hold property and effects, real and personal, by gift, devise, or purchase; and dispose of the same by sale, lease, or otherwise; said property so held not to exceed at any time the sum of \$200,000; may have a common seal, and alter the same from time to time, and make such rules, regulations, and by-laws from time to time, as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

SEC. 2. That the rules, regulations, and by-laws of the said existing board of trade shall be the rules and by-laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said association, known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created until their respective offices shall regularly expire or be vacated, or until the election of new officers, according to the provisions hereof.

SEC. 3. The officers shall consist of a president, one or more vice presidents, and such other officers as may be determined upon by the rules, regulations, or by-laws of said corporation; all of said officers shall respectively hold their offices for the length of time fixed upon by the rules and regulations of said corporation hereby created, and until their successors are elected and qualified.

SEC. 4. The said corporation is hereby authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it shall be transacted as they may think proper.

SEC. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the rules, regulations, or by-laws of said corporation.

SEC. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations, or by-laws thereof.

SEC. 7. Said corporation may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations or by-laws, for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association, or by other persons, not members thereof, the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

SEC. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-laws, then on filing such award and submission with the clerk of the circuit court an execution may issue upon such award, as if it were a judgment rendered in the circuit court; and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

SEC. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts; and the president or secretary is hereby authorized to administer such oaths of office as may be prescribed by the by-laws or rules of said corporation; said bonds shall be made payable and conditioned as prescribed by the rules or by-laws of said corporation, and may be sued and the moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

SEC. 10. Said corporation shall have the power to appoint one or more persons, as they may see fit, to examine, weigh, measure, gauge or inspect flour, grain, provisions, liquors, lumber, or any other article of produce or traffic commonly dealt in by the members of said corporation, and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such articles shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation or others interested, and

requiring or assenting to the employment of such weighers, measurers, gaugers or inspectors; nothing herein contained, however, shall compel the employment by anyone of any such appointee.

SEC. 11. Said corporation may inflict fines upon any of its members, and collect the same for breach of its rules, regulations or by-laws; but no fine shall exceed \$5. Such fines may be collected by action of debt before a justice of the peace in the name of the corporation.

SEC. 12. Said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the management of boards of trade or chambers of commerce, or as provided for in the foregoing sections of this bill.

Approved, February 18, 1859.

APPENDIX C.

DEPARTMENT OF AGRICULTURE,

Washington, January 4, 1922.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the original application of the Chicago Board of Trade for designation as a "contract market" under "The Future Trading Act," and the original designation of said Board as a "contract market" by the Secretary of Agriculture, on file in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the Department of Agriculture to be affixed on the day and year first above written.

[SEAL.]

HENRY C. WALLACE,

Secretary of Agriculture.

TO THE HONORABLE HENRY C. WALLACE,

Secretary of Agriculture of the United States.

The Chicago Board of Trade respectfully represents that it is a corporation created by a State charter granted to it on the 18th of February, 1859, and has since that date operated and maintained in the city of Chicago a Board of Trade whereupon its members buy and sell grain for future delivery.

That it is located at a terminal market (the city of Chicago) where cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of grain and the difference in value between the various grades of grain, and that said terminal market also has recognized official weighing

and inspection service, that is to say, the Board of Trade is by its charter authorized to appoint one or more persons to weigh grain and other articles, and its rules authorize the creation of a weighing department, and it has for many years maintained, and now maintains a weighing department, and has prescribed sundry regulations for the control thereof, and the State of Illinois has, by statute, established and maintains an official staff, consisting of one chief inspector and sundry deputy inspectors, whose duty it is to inspect and grade all grain coming to the Chicago market.

That it is prevented from modifying its rules and by-laws in respect to making and filing, or requiring any of its members to make or file, any reports required by Section 5 of The Future Trading Act, and is also deterred from admitting to membership any representative of any cooperative association of producers as required by Section 5, sub-clause (c), by an order of the Supreme Court of the United States entered on December 12, 1921, during the pendency in that court of a suit to test the constitutionality of said Future Trading Act, in which John Hill, jr., and others are appellants, and Henry C. Wallace as Secretary of Agriculture, and others, are appellees, as will more fully appear by a copy of said order hereto attached.

That it has duly adopted the following amendments to its existing rules:

"SECTION 2. No member shall disseminate any false, misleading, or inaccurate report concerning crop or market information or conditions that affects or tends to affect the price of commodities, and any member who shall knowingly or carelessly disseminate such report shall be suspended by the Board

of Directors from all privileges of membership for such period as the gravity of the offense committed may warrant.

"SECTION 3. No member shall attempt to manipulate prices of commodities, nor corner or attempt to corner any grain, and any member who shall knowingly or intentionally violate the provisions of this Section shall be suspended by the Board of Directors from all privileges of membership for such period as the gravity of the offense committed may warrant.

"SECTION 4. The Board of Directors is authorized to take such other steps as may be necessary or advisable to make effective sub-divisions (c) and (d) of Section 5 of The Future Trading Act.

"SECTION 5. Any member who, under sub-clause (b) of Section 6 of said Future Trading Act, shall be deprived of the privilege of trading in contract markets, shall be suspended from all privileges of trading on the exchange of this Association for such period as may be specified in the order of the Secretary of Agriculture against such member.

"Any member who shall accept, or execute, an order from any person who shall have been deprived of the privilege of trading in contract markets, shall be suspended from all privileges of membership in this Association for such time as the Directors, in their discretion, shall determine."

and desires to be designated temporarily, and during the pendency of said bill in said court and for twenty days after the final decree therein, a contract market as contemplated and authorized by said order.

Your petitioner accompanies this petition with a copy of its rules and the list of its members and copies of forms of contracts and confirmations used by its members in transactions on its exchange.

WHEREOF, your petitioner asks to be temporarily designated as a contract market for and during the pendency of said bill and for twenty days after the final decree therein.

BOARD OF TRADE OF THE
CITY OF CHICAGO,

(Signed) By JOSEPH P. GRIFFIN,
Its President.

(Signed) JOHN R. MAUFF,
Its Secretary.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

JOHN R. MAUFF, being duly sworn, says that he is the Secretary of the Board of Trade of the city of Chicago, and that he has read and knows the contents of the foregoing petition, and knows that the same is true of his own knowledge.

(Signed) JOHN R. MAUFF.

SUBSCRIBED and sworn to before me this 19th day of December, 1921.

(Signed) JOHN A. AITKINS,
Notary Public.

Pursuant to the authorization and direction contained in an Act entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes," Public No. 66, 67th Congress, known by the short title of "The Future Trading Act," and an order of the Supreme Court of the United States entered on the 12th day of December, 1921, upon the appeal in the case entitled *John Hill, jr., et al. v. Henry C. Wallace*

et al., No. 616, I, Henry C. Wallace, Secretary of Agriculture, hereby designate the Board of Trade of the City of Chicago, Chicago, Illinois, as a "Contract Market" under said Act, said Board of Trade having applied for, and having otherwise complied with the conditions and requirements of said Act as a prerequisite to, such designation, except as restrained therefrom by said order of the Supreme Court of the United States. Said Board of Trade is so designated for the period only of the pendency of said appeal in said Court and twenty days after the final decree therein, and said designation is subject hereafter to suspension or revocation in accordance with the provisions of said Act, except as otherwise provided in said order of the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed in the City of Washington this 21st day of December, 1921.

HENRY C. WALLACE,

Secretary.

APPENDIX D.

STATEMENT OF SENATOR ARTHUR CAPPER, UNITED STATES SENATE, AUGUST 9, 1921, ON THE PROVISIONS OF THE FUTURE TRADING ACT.

MR. CAPPER. Mr. President, it is nothing new that we hear to-day from the producers of food, from grain dealers and millers, and from the victims of speculation carried on without restriction, of the abominations of speculation in these basic products. It has been heard again and again, though this is the first time a bill has come to a vote in the Senate. But the Senate and the other branch of Congress again and again have had their attention called to this thing and inquiries have been held and hearings given at which over and over it has been charged and admitted that gambling constitutes a great part of all the business transacted on these exchanges. It is an immoral practice. But we are attempting to correct it in this bill, not merely because of its immoral character and influence but because of its arbitrary interference with economic laws and its disturbance of the balance that demand and supply of commodities when left to itself brings about. This great law of nature has always appealed strongly to the sense of justice in all men. Anything that tends to destroy or frustrate this great democratic law of nature, any combination or any distorted mechanism of trade is offensive to the sense of common justice and fair dealing which all men, and certainly we as Americans, cherish.

During the past year the price of wheat and corn has been determined to a large extent not by the demand and supply of the commodity itself but by the fabulous quantities sold on the exchange that never had any existence, that no grain farmer in the world ever planted, ever toiled over its cultivation and harvest, or offered for sale. I claim in behalf of this bill that its sole purpose is to eliminate from the exchanges exactly those operations that do not conform to a market place where prices are determined in accordance with the law of demand and supply. The defenders of these practices of gigantic speculation and gambling do not deny the practices; they rest on the proposition, which in the long run is undoubtedly correct, that speculation can not overcome the law of demand and supply. We admit that it can not. But we know that temporarily, at least, the fictitious demand or fictitious supply created by gambling deals on the exchanges distorts true demand and supply and creates a false price; that it causes, and during the past year has caused, violent and unnatural fluctuations; and that when wheat and corn came on the market a year ago the resumption of options dealing was immediately followed by such an orgy of gambling operations as to drive prices within a period of months far below the cost of production.

Mr. President, when trading in wheat futures was resumed in July of last year, after more than two years of its suspension as a war measure, the "traders" of the Chicago Board of Trade began a great "bear" raid. This bear raid was maintained for nearly 10 consecutive months in the face of the greatest export demand for wheat this country ever experienced. When this raid began December futures

opened at \$2.75 per bushel. Before it ended the farm price of cash wheat in the grain belt had fallen to 85 cents a bushel.

While this steady decline and tremendous fall of wheat prices was going on during the old crop year ending in June this country established new high records for wheat exports, measured both in dollars and in bushels.

I offer these and other facts as my indictment of the grain gambler. His own market statistics convict him. The Chicago Board of Trade pleads guilty to his evil practices and promises, as it often has before, to abate them. On behalf of national welfare, on behalf of fair dealing and honest markets, I ask that the Nation's lawmakers put an end to this great evil.

The purpose of this bill, Mr. President, is to correct some of the evil practices of the professional speculators on the grain exchanges and to authorize supervision of the grain-futures markets, but not to disturb any of their legitimate and useful functions. It will not put any curb upon free and unlimited hedging by elevator companies, exporters, millers, and other manufacturers of grain products.

Briefly summarized, the evils in the marketing system which this bill undertakes to correct are:

- (a) Market manipulation by large operators.
- (b) Promiscuous and unrestricted speculation in foodstuffs.
- (c) Dissemination of false crop information.
- (d) Gambling in indemnities or "puts" and "calls."
- (e) Arbitrary interference with law of supply and demand.

That these evils exist and should be eliminated is not challenged. They all grow out of dealings in

futures. The bill does not touch any transaction in cash grain, for it is expressly provided in the definition section that it shall not include any cash grain or deferred shipment.

The plan of the legislation for correcting the evils is that future transactions shall be engaged in only on certain boards of trade, as, in fact, they now are. It then places the duty upon the boards of trade to correct the evils. It does not tell them how to do it. Their past experience has shown that they know how to do it. Their representatives agree that they will undertake to do it, and really all the legislation does is to compel them to do, under supervision of the Secretary of Agriculture, that which they say they ought to do and ought to have done a long while ago.

Every reasonable suggestion for safeguarding the machinery of the trade has been incorporated in the bill now before the Senate. Let me repeat that the bill does not concern itself at all with the sale or purchase of actual grain, either for present or future delivery. The entire business of buying and selling the actual grain, sometimes called "cash" or "spot" business, is expressly excluded. It deals only with the "future" or "pit" transaction, in which the transfer of actual grain is not contemplated. This legislation does not destroy the hedge; but on the contrary its object is to improve the hedge. It is not a regulation of business in the sense in which that term is usually employed.

What it does, very roughly, is this: It says to the eight boards of trade:

"Your body, if it wishes to deal in futures, must prevent the artificial manipulation of prices; you must prevent the circulation by your members of

false reports as to crops or markets; you must abolish the most vicious and harmful forms of pure gambling."

It vests in a board of three Cabinet officers the power, not of regulation, but of supervision; the power to see that the boards do correct the abuses; and if they do not, these Cabinet officers have the power, subject to court review, to suspend the offending trader or, as a last resort, the board itself from the privileges of trading in futures.

DOES NOT INTERFERE WITH LEGITIMATE GRAIN TRADE.

Let me repeat that the bill does not interfere with any legitimate function of the board of trade. What it does, in brief, is this:

First. It specifically permits dealing in futures by providing that such dealing shall be carried on in certain markets. At present there are eight markets in which facilities are provided for future trading. All of them are located at terminal markets. The measure provides that the Secretary of Agriculture shall designate such boards of trade as "contract markets." It will be observed that no discretion is lodged in the Secretary of Agriculture, but that he is "directed" to designate such boards as meet the requirements as contract markets. If he refuses, he can be compelled, by mandamus, to make the designation.

Second. As a check on the evil of manipulation, the bill requires future contracts to be evidenced by memorandum in writing. It requires that the governors of the boards of trade shall direct members to make and file reports of such future transactions. It makes such records available to the inspection of the Department of Agriculture and the Department of Justice. At the present time no one can tell from the

records what part of the trades in futures are speculative and what part are bona fide hedges. No one should object to this provision except the manipulators. Secrecy is necessary to the manipulator of the market, which is probably the reason the Chicago Board of Trade keeps no records. If a big manipulator undertakes to "bear" the market and the whole world knows he is doing it, he is the loser.

Third. The bill requires the boards of trade to use diligence in preventing the dissemination of false crop reports by its members.

Fourth. The bill requires that the privilege of dealing in futures shall be withdrawn from any board of trade unless it enforces rules which will prevent manipulation. Any manipulation of the market would mean the closing of its future trading business.

The bill then vests with the Secretary of Agriculture power, subject to court review, to investigate an individual member who is charged with disseminating false crop reports or manipulating prices, and, upon finding that such individual has been guilty of such practices, to suspend him from the trading privileges of contract markets. This is subject to court review. It then provides that in case a board of trade itself is not using reasonable diligence to correct these abuses a commission of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General may suspend its designation as a contract market, subject to a review by the courts.

Publicity is a true precautionary measure in reference to public markets, as it is in many other things. Section 5 of the bill is not an inquisitorial interference with the free course of trade, but merely a sanitary provision calculated to purify the atmos-

phere of the grain pits and to admonish speculators and gamblers of the right of government to protect the public and legitimate commerce from the abuses on these exchanges. I believe that the effect of this section will be salutary and that the requirement that records shall be made and kept on file of every transaction from its start to final completion will of itself greatly tend to deter big and little gamblers from attempting to interfere by their operations with the markets.

There are three additional provisions which should be noted. They are:

First. The taxing out of existence indemnities or puts and calls. Every representative of the board of trade before the committee admitted their evil and approved of their prohibition. A "put" is an option for a contract of sale; a "call" is an option for a contract of purchase. The consideration of the option is a dollar a thousand bushels. If the market closes to-day at \$1.30, I may go to a dealer in Chicago and buy of him a "call." He fixes the "call" price. This "call" price is a fixed amount over the close of to-day's market. If it is a stable market, it may be 5 cents over to-day's market; if a fluctuating market, it may be 10 cents. Let us assume that he fixes the call price at 5 cents over to-day's market, or \$1.35. The call is only good for the next day's market. The result of the transaction, then, is this: If the market to-morrow closes at \$1.35 or over, I can exercise my option and compel the dealer to sell to me the wheat covered by the call at the call price. If it does not reach that point, I have lost the money paid for the option. The abuses to which this transaction are put are many and the good it does is so remote and theoretical that all agree that they should be abolished.

Second. By amendment made in the House, the bill provides that contract markets shall permit co-operative associations of producers to membership. A great storm has waged over this provision, but I think it is one of the most commendable features of the bill. The boards of trade say that co-operative associations are now welcome to membership, and, in fact, such associations are members of one or two of the boards of trade. The boards of trade, however, have a rule which prohibits rebating or splitting of commissions. They have never permitted a co-operative association to become a member unless that association distributed its profits upon the basis of the capital invested by its members. Most co-operative associations distribute their profits not upon the basis of capital invested, but upon a patronage or earning basis; that is, the more wheat a man sells through an association the greater his share of the profits, without reference to the man who has contributed to its capital. This, the boards of trade insist, is equivalent to a rebating of commissions; but I do not agree with them. If the co-operative system of marketing can handle the grain more economically or more satisfactorily, it will in time prevail despite any obstacle that may be placed in its way. Whether the co-operatives can or can not do this, time alone will tell. In the meantime, they should be encouraged and should be given an even chance. It does not seem to me that it is a matter in which the boards of trade are interested, and that they could well afford to welcome them to membership and give them a chance to show that they can do the business more efficiently than it is being done at present.

Third. The bill as originally introduced in the Senate by myself, and in the House of Mr. Tincher,

provided for the elimination of so-called private wires. This was stricken out in the House and has been reinserted by the Senate committee.

Mr. President, it is against the law to run a gambling house anywhere within the United States. But to-day, under the cloak of business respectability, we are permitting the biggest gambling hell in the world to be operated on the Chicago Board of Trade. The grain gamblers have made the exchange building in Chicago the world's greatest gambling house. Monte Carlo or the Casino at Habana are not to be compared with it.

More than 500 private-wire houses have direct connection with the Chicago Board of Trade, according to the Federal Trade Commission, and it costs \$3,000,000 a year to maintain them. Then come the wire systems of the Chicago brokerage houses, which seek speculative business where they may. One such system has 66 branches in 19 States. Eight years ago it had only 33. The mileage of the private-wire systems of Chicago Board of Trade members having offices in Chicago exceeds 106,000 miles.

This shows how the gambling game is growing.

The extent and completeness of its system for rounding up suckers explains how the Chicago Board of Trade must "sell" more grain every year than the entire globe produces. Approximately from eighteen and a half to twenty billion bushels of grain are sold at Chicago annually at a value ranging from fifteen to more than twenty billions of dollars.

The private-wire houses reap fortunes from the gambling in futures. A single house will in three days sell as much grain as can be delivered on the

futures market in a year. When their wires are not otherwise engaged, they are used for transmitting faked or exaggerated statements of market conditions to get the little fellows into the game for the sake of the commission revenue.

Mr. President, the small gambler in futures has no more chance to win than the small gamester in a gambling house where they use marked cards and loaded dice.

In its constant search for victims to play the market the Chicago Board of Trade does more fishing than goes on in all the Seven Seas. Every week day it casts its net over the United States and Canada. Every night it is drawn in. You can hardly imagine the extent of the catch. Some recent instances are impressive.

One is the admitted embezzlement of \$1,187,000 by R. J. Thomson, comptroller of the Minnesota firm of packers, the George A. Hormel Co. Thomson is credited with losing a part of this huge sum in operations on the Chicago Board of Trade.

Another is the closing of the Arcola (Ill.) State Bank and the arrest of its president and cashier, father and son, for a shortage of \$400,000, due to losses in the Chicago grain pit.

Still another instance is found at Prophetstown, one of the largest grain centers of Illinois. Prophetstown's most prominent citizen and bank president, George E. Paddock, is now a fugitive from justice at the age of 72. His son, the bank's cashier, indicted with him for embezzlement of \$150,000 of depositors' funds, has recently given himself up to the sheriff. Behind the bank room proper examiners found a secret chamber with direct wire connections to Chicago brokerage houses.

F. R. Robertson, prominent real estate and insurance man of Newton, Ill., in a fit of insanity caused from brooding over losses on the Chicago Board of Trade, shot and killed Charles Sutton, member of a grain brokerage firm, then killed himself.

When a cashier of the city treasury at Boston was appointed treasurer the other day, it was discovered he was short \$40,000. He had lost it in grain market speculation expecting every day to win.

An Omaha grain operator named Rothschild, with offices at Omaha and St. Louis, staked his all in the Chicago Board of Trade's gambling game and lost, then turned on the gas and died.

A widow at Topeka, Kans., is suing to recover \$35,000 lost in grain speculation last spring. A book-keeper in a grain operator's office tells me the country would be shocked if it knew how many women were "playing the market."

At Corning, Kans., only a few weeks ago, after using the money of others in market flyers, and losing it, E. A. Miller, manager of the Farmers' Elevator Co., took strychnine when exposure came, ending his hopeless efforts to win back these losses.

Elevator managers, I am told, are particularly susceptible to the grain-gambling mania. At one of our hearings A. L. Middleton, member of a farmers' cooperative elevator company at Eagle Grove, Iowa, testified that so many elevator managers had gone wrong in Iowa that his company had instructed its manager not to use the "hedge" except when requested to by vote of the directors.

This country is strewn with the financial carcasses of thousands of men who have been ruined in the Chicago grain pit. I have had scores of personal letters citing most pathetic cases. The

almost constant stream of suicides and embezzlements for this cause in the day's news shows that the board of trade gambling game is widespread and claims many victims yearly.

Mr. President, of what use is it to abolish public gambling or to abolish the lottery when an institution is maintained in the small town to which every man is invited to drop in and gamble a few dollars on the grain market? It has been said many times during the hearings before the committee that his chance of winning was not one in twenty. The effect on the market is certainly harmful, for whether it affects the prices up or down it is an unwholesome and artificial market which is thus created.

It has been argued that it is necessary to have the small gambler in the small town to maintain the hedge. I do not believe it; probably half of the representatives of the boards of trade do not believe it and say so. It is a matter not capable of exact proof. I do want to say this, however: It is unbelievable to my mind that the merchandising of the foodstuffs of the country can not exist without a thousand gambling houses scattered all over the country engaged in gambling in the products of the farmer. I do not want my bread any cheaper if my gain comes from the widow who has gambled away her life insurance money, or from the farmer who has gambled away the savings of a lifetime, or from the bank clerk who has gambled himself into the penitentiary.

BOARD OF TRADE WILL NOT CLEAN UP.

Mr. President, probably the strongest argument that can be used at the moment in support of any contention that the grain exchanges should be placed

under Government supervision is to quote the words of the Chicago Board of Trade's president and directors who outlined and described the evils of the trade (Exhibit B, pp. 474-478, hearing before the Committee on Agriculture and Forestry, United States Senate, on H. R. 5676) and, as early as April 12, 1921, promised prompt remedial action by the board of trade. In the same volume, page 485, J. P. Griffin, president, in a letter to Mr. Gates, set "July 25, as the date when the proposed amendments will be enacted into rules," but that date has passed and no report has been made by committees. Apparently the board of trade is making no effort to eliminate the evils which everyone admits exist.

Only yesterday I received a letter from a well-known member of the Chicago Board of Trade in which he says:

" 'Puts' and 'calls' are still rampant and 'private wires' are endeavoring to stave off action until Congress adjourns. To-day, like all business days for years past, Armour is selling all the 'puts' and 'calls' in unlimited quantities that the 'traders' will buy. If he can manipulate the markets to-morrow, so that they will not advance above 'calls' or decline below 'puts' the \$10,000 or \$20,000 which the farmer, the barber, and the blacksmith has bet with him to-day will be 'velvet.' They call it speculation, but they know and you know it is the cheapest sort of gambling.

"Personally, I visited the wheat pit this afternoon ('puts' and 'calls' are traded in between 1.30 p. m. and 2.30 p. m.) and Armour's representative, George A. Seaverns, was surrounded by anxious buyers of 'puts' and 'calls' on wheat, who were taking them as fast as he could write down the transactions.

In the corn pit I found H. E. Schwarz, another agent, was performing the same service in corn.

"A very large percentage of the membership of the board of trade are criticizing the directors for their failure to keep faith with you gentlemen in Washington, especially in so far as the abolition of "puts" and "calls" are concerned, for every member knows that it did not require the appointment of a committee, nor any delay exceeding 20 days from the date when they declared against further tolerating them, to have utterly abolished 'puts' and 'calls.' All of this spread-eagle stuff is to gain time and quiet any criticism from Washington. In the meantime, Armour is the bookmaker and absorbing the same as a pool room absorbs the suckers' bets which roll in over private wires from every village and hamlet of the great West."

OBJECTIONS TO THE BILL ANSWERED.

Mr. President, what are the objections to the pending measure by the exchanges? First, they say that the law is unconstitutional because of the use of the taxing power. The use of the taxing power for similar purposes has very many times been used by Congress. The cotton futures act is an example. In *McRae v. the United States* (195 United States, 27), the Supreme Court of the United States expressly said that the power of Congress to tax was its broadest power; and that the courts would not inquire into the reason for the use of the power; and in that case they sustained the law, which taxed artificially colored oleomargarine out of existence, when the entire history of the law shows that it was not, in fact, a revenue measure. I am advised by able lawyers that the proposed law is entirely constitutional.

Aside from their objection to the cooperative section, the great burden of the objection of the exchanges is the well-known cry, governmental regulation. I submit for the careful consideration of the Senate that this is not a regulatory measure. It is a measure which points out the evils, and gives the business itself the right and the power to correct them, and vests in the Government only the power of supervision and says to them that they themselves must correct these evils, or the Government will undertake to do it.

The powers conferred by the bill are as follows:

First. The Secretary of Agriculture is directed to designate certain contract markets. These markets which comply with the conditions are entitled to be so designated.

Second. Records of their transactions are required to be preserved for three years "or for a longer period if the Secretary of Agriculture shall so direct." Certainly no bugaboo can be made out of vesting the power with the Secretary of Agriculture to require them to preserve their records for a longer period.

Third. Section 5, subsection B, requires the governing board of the contract markets to provide for the making and filing of reports "in accordance with the rules and regulations and in such manner and form as may be prescribed by the Secretary of Agriculture and whenever, in his opinion, the public need requires it." It will be assumed that if the records maintained are intelligible the Secretary will be satisfied, and that he will never exercise this power unless some member refuses to keep records which are intelligible.

Every other power is vested in the governing board of the exchange themselves. Every subsection of section 5 that places a requirement commences with the words, "When the governing board thereof."

So much for regulation.

When it comes to the matter of enforcing the law, that power must be in some one. It would be absurd to enact a law without providing for its enforcement. Aside from the usual penalty clause two methods are used. One of them was placed in the bill at the suggestion of the exchanges, and that was to provide that in case one member of a board of trade manipulated prices or circulated false reports the Secretary of Agriculture, after a hearing, shall suspend him from the privileges of future trading. The second method is that if a board of trade are not using reasonable diligence in cleaning up their house a commission of three—the Secretaries of Agriculture and Commerce and the Attorney General—may suspend their privilege as a contract market, and both of these are subject to court review.

Mr. President, the principal complaint growing out of governmental regulation is that the power is, in the last analysis, exercised by subordinates. The powers lodged in this bill to a great extent are such that they can not be delegated. No one but the Cabinet members themselves can sit upon this commission in finally passing upon the question as to whether the contract market shall remain in business.

The fact about the matter is that the objection on the ground of regulation will not bear the test of analysis. There is no regulatory power lodged in the bill except the very minor one as to the manner in which records should be kept. The other powers are vested in the governing boards of the exchanges themselves. Powers of enforcement of the law are vested in officials of the Government, subject to court

review, and it is respectfully submitted that powers of enforcement can be lodged nowhere else.

A great many opponents of the measure who appeared before the two committees, representing the grain trade generally, agreed that in view of the storm that has raged about their operations for years some legislation would be helpful to the grain trade. I quote from the statements of some of the representatives of the grain business who appeared before the committees.

The following colloquy occurred between Mr. Julius Barnes and the chairman of the committee, the Senator from Nebraska:

"The CHAIRMAN. I think you will agree there are a good many things going on on the boards of trade that ought to be eliminated if they can be.

"Mr. BARNES. Yes, Senator. My whole emphasis is that the exchanges have clearly made some progress in eliminating those things. Take these spectacular corners of 20 years ago. The business conscience which thought they were smart has entirely altered.

"The CHAIRMAN. Your theory is that it will improve itself if we let it alone?

"Mr. BARNES. Yes.

"Senator KENDRICK. Is it not possible under some conditions that corrective legislation might hasten those things or, even in some cases, it might bring reforms that the exchanges themselves could not possibly reach by their own authority?

"Mr. BARNES. Yes; that is true. I must recognize that."

Mr. Barnes had stated that he believed that if the exchanges were let alone they would correct these evils, and that they were getting better. He was

asked if the gambling in "puts and calls" had not been going on for many years, and he was then asked:

"Senator CAPPER. * * * Have there been any rules and regulations of boards of trade laid down that would tend to eliminate that evil—and everybody admits it is a great evil?"

"Mr. BARNES. No. I think that is a fair shot at the exchanges. They should have eliminated that some time ago, because the public sentiment of the exchanges is almost unanimously behind their elimination. You are quite right in pointing out that the exchanges have failed to do that, even after public sentiment has formed, but they will do it.

"Senator CAPPER. I think you will find the same statement made in the testimony that was given 12 years ago that you have made, and that is the only reason why I think there is more pressure back of this legislation at this time than ever before. There is a feeling, I think, on the part of a great many that the time has come when Congress must step in and undertake to do some of these things that the grain trade itself has failed to do.

"Mr. BARNES. Senator, it is because I quite appreciate that that must be the situation—that there is pressure upon your office—that I have made these suggestions in regard to this bill. They are what, I believe, would preserve its constructive features and not make it destructive, although I am opposed to the regulation on principle."

Later on, he said:

"Mr. BARNES. Well you see we are quite in accord as to the desirability of all of the enactments in the bill up to the point of intrusting in some hands the authority to close those exchanges. That, I think, is fatal because it undermines the trading.

"Senator KENDRICK. That could be done with great discretion; I have no doubt about that.

"Mr. BARNES. That is true. If you can alter that so as to put certain safeguards and assurances that it would not have the hasty judgment of any single man, no matter what his office, you have modified that very considerably."

Since Mr. Barnes testified the committee has so amended the bill to meet his objection that the power should not be vested in the hands of a single man.

Mr. Moore, of the Duluth Board of Trade, said, concerning this measure:

"I feel that the spirit back of this proposed legislation means to be constructive and intends to deal fairly with all interests affected. I am not here to object to Government supervision of exchanges, if Congress feels that the public welfare requires it.

"Manipulation is so infrequent and usually obvious when it is in process that the exchanges can easily check it when they see the strong arm of the Government is behind it, with their laws already existing."

Mr. Crosby, of the Crosby Milling Co., of Minneapolis, said:

"Mr. CROSBY. I think, Senator, our objection to the bill is to the feature of governmental control.

"The CHAIRMAN. Do you not want any governmental control?

"Mr. CROSBY. We do not have the slightest objection to supervision."

When Mr. Arnot of the Chicago Board of Trade was on the stand his attention was directed to the evil practices which had been enumerated by Mr. Griffin, the president of the Chicago Board of Trade, to the directors. He was then asked if those evils

had not been embodied in the general principle of this bill. His answer was as follows:

"Mr. ARNOT. Yes, sir; I think you are right, Senator. I think they will be covered, but, Senator, there are other things that come up from time to time that might be wrong, some practice for instance, that was never experienced before, which we would want to correct. There is no bill that can cover all of these things that might go wrong on an exchange. However, it is the duty of the men who are there and in touch with conditions to find out and correct those things, and they should be made to do that. That has always been my opinion and is yet. They can do it better with authority back of them than otherwise, but it is up to them to do it."

Mr. Wells, of Minneapolis, summed up his position in a few words:

"Mr. WELLS. Mr. Senator, I am not opposed to some legislation on the subject of grain trading or grain exchanges. I do not think any grain exchange opposes some legislation which will make that exchange directly responsible to the Government for the proper conduct of its business. I think what they resent is an interference with the internal operations of the exchange which jeopardizes the operation of the market."

Mr. Wells presented the amendment which the exchanges desired, and then said of it:

"I do believe that under the bill as amended we can function, and I think we would cooperate in every way to make it a success, but to go further and introduce more drastic features I doubt very much whether it would be anything but a case of strangulation—a slow death."

He also said:

"I quite agree with your expression the other day, Senator, that we would gain a certain prestige or gain a certain public confidence if we were directly responsible to some governmental agency.

"Senator CAPPER. I think you said you would be in favor of some kind of legislation?

"Mr. WELLS. I favor a supervision which does not extend to the point of regulation. I favor making accessible to the proper Government authority such information as he may require when the public interests demand it.

"Senator McNARY. If the proposed measure and the amendments that you have submitted this morning were written upon the statute books and became a law, is it your opinion that that law would place such restrictions and difficulties upon the grain markets as to injuriously affect them?

"Mr. WELLS. I believe that if the law as proposed were wisely and fairly administered the grain exchanges could continue to function satisfactorily. I think that temporarily the investing public might avoid the exchanges, but I think they would ultimately come back."

These were all statements made before the Senate committee.

At the time the representatives of the boards of trade appeared before the House committee the bill was in the form in which it was originally introduced in the Senate by myself and in the House by Mr. Tincher. Of the bill as originally introduced, which is in substance the same as the bill now before the Senate, Mr. Wells, of the Minneapolis Board of Trade, speaking before the House committee, said:

"H. R. 2363, the so-called Tincher bill, embodies a great many constructive ideas, and with certain modi-

fications, to make it practical in its operation and to preserve the hedging markets, would, in my judgment, prove constructive legislation."

He also said:

"It is rather significant, and I think will give you a little confidence in the position of the grain trade, to know that there is hardly a provision in the bill H. R. 2363, Mr. Tincher's bill, which has not been covered prior to this hearing and subsequent to the general discussion of this subject by recommendations and resolutions of the boards of directors of the various grain exchanges of this country."

Mr. Griffin, the president of the Chicago Board of Trade, which board of trade, I might say, is the strongest opponent of this sort of legislation, said before the House committee, in opening his remarks, as follows:

"I also concur in the statement of Mr. Wells that the Tincher bill has many elements of a constructive character. In principle, I wish to say to you, I indorse the Tincher bill. In precise detail I believe it needs amendment, largely to meet practical questions."

The original bill also had the indorsement of a number of other representatives of the grain exchanges.

PRICES OF FOODSTUFFS MANIPULATED BY SPECULATORS.

Mr. President, manipulation of the prices of the foodstuffs of the country by individuals for their own profit does exist, and it is conceded by all that it exists. The circulation of false and misleading crop information does exist. The legitimate machinery of the grain business has been prostituted, par-

ticularly in the small towns, to the purpose of pure gambling.

Statistics were presented to our committee, which have not been denied, that during certain periods the speculative market was more than three hundred times as large as the cash market. That is to say, there has been bought and sold in the pit three hundred times as much grain as actually existed, the exact figures being that for every 28 bushels of actual grain available 10,000 bushels have been bought or sold.

The Federal Trade Commission, in its recently published report, finds that future trading in grain amounts some years to more than 20,000,000,000 bushels, or three times all the grain produced in the world, while the actual amount of grain which changes hands at Chicago, where five-sixths of this trading is done, is a small fraction of 1 per cent of these billions of bushels. Transactions last year amounted to fifty-one times the amount of wheat produced in the United States.

That the abuses of the present marketing system should be corrected is not even open to dispute. It is the claim of representatives of the grain business that their correction should be left to the boards of trade themselves without any legislation. It is interesting to note, however, that in hearings before the committee of the House of Representatives 12 years ago, when a similar bill was before that committee, the representatives of the boards of trade admitted then, as they do now, the existence of abuses, but claimed then, as they do now, that the correction should be left to the boards themselves. During the 12 intervening years very little has been done to correct the abuses.

This is not the first time an attempt has been made to correct these abuses. The matter has been before Congress off and on for more than 20 years. It has failed heretofore, in my judgment, because this is the first time that the taxing power has been attempted for that purpose. To undertake to correct the evils by use of the power over commerce or over the mails has been unsuccessful because the transactions are not matters of interstate commerce; and to forbid the use of the mails does not prohibit, but only interferes with their operation and interferes with the legitimate business as well as with the abuse.

Mr. President, in practically all of the Western States and in many of the other States statutes have been enacted which have undertaken to remedy some of the evils, particularly that of promiscuous gambling. The police power, which is reserved to the States, has made that possible. The difficulty with these statutes is that in nearly every instance they prohibit a transaction where delivery is not intended. To prove intention is difficult and the statutes have been avoided by a simple provision in the contract for the future trade, reciting that it is the intention of both parties to make and accept delivery. Moreover, the States can not cure the evil. All that a single State could do would be to force the operators into another State.

Future trading in grain almost exactly as it is carried on in this country was carried on in Germany years ago. In 1896 the Bourse law was passed by Germany, which absolutely prohibited speculation in futures. This was modified in 1900 to permit such trading by members of grain exchanges only. The public in that country was not and is not permitted to speculate in foodstuffs.

The history of this sort of legislation in the Old World, the statutes of our various States, and the many years of study given to the subject by the committees of Congress and of the various departments should be proof enough that evils exist.

For many years there have been complaints of false crop reports. A report will go out to the grain trade that a bountiful rain has assured a tremendous crop in Kansas. The report will be in fact untrue. These became so frequent in 1920 when the great decline in prices occurred that I caused a number of these complaints to be investigated. In nearly every instance the source of such false information was found to be an operator on the "bear" side of the market.

Reports will come out to-day and be contradicted to-morrow. Certainly no harm can come from a requirement, as is found in this bill, that some supervision over reports of crop conditions shall be had, to the end that truth and not falsehoods shall be scattered broadcast.

Manipulation on the "short," or selling, side of the market by big speculators and "bear raids" by their followers, such as happen every year shortly before or immediately following harvest, play directly into the hands of European importers, who are enabled to buy millions of bushels of wheat in the futures market at a reduced price, which they later exchange for cash wheat. On several occasions during this greatest export year for wheat the raiders of the wheat pit depressed the price of the American crop 12 to 14 cents below the world price, below the cheap wheat of South America.

In playing their game the Chicago wheat gamblers sold something they did not possess to bear down the price of something they did not own. They wrecked

the true market, depressed the value of the producer's property, and the big speculators and exporters bought wheat cheaper and cheaper.

Board of trade gamblers make wagers on billions of bushels of grain annually. A single commission house in the Chicago Board of Trade will in three days sell as much grain as can be delivered on the futures market in an entire year. Often an entire crop is "sold" before any of the grain has been harvested. One big market operator was "short" 39,000,000 bushels of corn in December when the price broke 4½ cents. It was a lucky break for the operator, although it subtracted from the value of the corn crop of every State in the Union.

Mr. President, every member of a grain exchange who testified before the Agricultural Committee of the Senate acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. It was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also it was shown that a continually fluctuating, and not a stable, market is the desire of the speculators.

Such a market is against the interests of the producer; he must have stable prices in order to market his crops to the best advantage. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed when buying in the country, and it comes out of the farmer. Also, when prices are fluctuating as they have done for months past, consignments of grain from country points to the terminal markets are more likely to find the bottom price of the day's range than the top.

Fluctuations benefit the scalper, whether in the pit or at the cash grain tables, but work against the producer.

OPERATORS ADMIT MARKET IS MANIPULATED.

Mr. President, the representatives of the boards of trade who have appeared before the committees of both House and the Senate have been frank to admit that manipulation goes on. In order that there may be no possible doubt that this manipulation of prices exists, I want to read you a few excerpts from the testimony of witnesses before the committees. In doing this I confine myself to the representatives of the grain trade, the boards of trade, who have appeared in opposition to the bill. It appears in practically all of the testimony of all of the witnesses, and it would only be duplication to refer to the testimony of some of the other witnesses before the House committee.

Mr. Julius Barnes, grain exporter and formerly president of the United States Grain Corporation and Wheat Director, in speaking of manipulation, said that the officers of the boards of trade know very well when manipulation is going on and who is doing it. I quote from his testimony:

"Mr. BARNES. Why don't you drive right at the speculator who uses these market facilities?

"The CHAIRMAN. Would we not have to separate his contracts from the others and find out how much he did?

"Mr. BARNES. Yes, Senator; and that would be a hopeless project if you tried to analyze all the trades.

"The CHAIRMAN. Then, how can you drive at him?

"Mr. BARNES. The man who is doing that can be located by the size of his orders and the resources that he has.

"Senator REED. How? Now, you come to the question.

"Mr. BARNES. The exchange authorities themselves know very well by whom and when that is going on.

"Senator REED. Then, the exchange authorities must be able to distinguish between that kind of a deal and other kinds of deals?

"Mr. BARNES. Not the deal. They go at the individual who originates the deals, and by tracing his operations they can tell whether they are of a size and character such as to come within the definition of manipulation. Business conscience to-day condemns the manipulator.

"Senator CAPPER. Is it not a fact that at various times while that bear market was on large operators went on the market and sold wheat in large volume, some of them possibly several million bushels, in the course of a day or two days?

"Mr. BARNES. By common report, and I presume that is correct. It was done, Senator; yes.

"Senator CAPPER. Now, would not that have a tendency to aggravate the situation and to further depress the market?

"Mr. BARNES. Yes; while it lasted.

"Senator CAPPER. And would not that work to the injury, first, of the producer?

"Mr. BARNES. At that time, yes; of course it must be met at some stage by buying an equal weight. They must get those contracts back and induce the buying of equal force. The injustice in that, Senator, lies not so much in that transaction as in the fact, which every reasonable man must admit, that through that process of decline under the influence of those sales some farmer may have his confidence undermined and market his product on the lower basis.

"Senator CAPPER. Does that particular transaction that I spoke of on the part of the Armour Grain Co., for example, who, under the present rules, can go on the market any day and sell five or ten million bushels of wheat, assist in stabilizing the market or maintaining a steady market?"

"Mr. BARNES. No; because that is a transaction of great weight under concentrated direction. It is just like any combination, and therefore is not fair, and is a matter which the exchange authorities ought to govern and regulate among themselves. The manipulator is an undesirable factor anywhere. He sometimes injects himself into the business of the exchanges, but not so often as in other businesses, or to such a harmful extent, such as building construction and building materials as recently disclosed."

Mr. Hargiss, the president of the Kansas City Board of Trade, testified as follows:

"You want to know something of the abuses. I must admit to you that I think manipulation is a grave abuse on the exchange when it is indulged in. I think, on the other hand, that practically all manipulations, with few exceptions, have been on the long side of the market."

Upon being asked whether or not manipulation ought to be prevented, Mr. Hargiss answered:

"Oh! absolutely." (S. Res. 275.)

And again, on page 277, he said:

"You could put a very heavy penalty upon manipulation. Personally, I believe if there is not already a Federal statute—I know one man that was indicted for manipulation, I believe, but even a stronger criminal law on manipulation would cure the whole thing."

Mr. Arnot, a member of the Chicago Board of Trade, testified:

"Senator CAPPER. Would it not be a good plan, then, to have some sort of governmental supervision, such as we contemplate in this bill, which will give an impartial Government official the opportunity to see the books on such an occasion as we have in mind here, when we think the market is being manipulated by somebody for the purpose of depressing the price of the farmers' product?"

"Mr. ARNOT. I should have absolutely no objection to that."

Mr. Gates, for years president of the Chicago Board of Trade, testified as follows:

"Because the trade recognizes the manipulator as an enemy to the whole organization, to the whole trade, we dislike him just as much as any of you gentlemen do, and if we could find any way of shutting him out absolutely we would be glad to do it. Maybe you can help us on some of these problems."

F. M. Crosby, of the Washburn-Crosby Flour Mills, said:

"We are heartily in sympathy with the elimination of manipulation. A man should not be permitted to deal in these large volumes. If by supervision of the secretary the penalty should fall on that man, I do not think you would have manipulation, at least then."

These quotations are made by the leaders of the opposition to this measure, and they speak for themselves.

Frederick B. Wells, of the Minneapolis Board of Trade, and one of the men in charge of the opposition to this measure, in testifying before the House committee in April of this year, said: .

"No; I wanted to eliminate manipulation, and I still want to do that. I do not call it gambling. I call it speculation. I still want to eliminate manipulative speculation; that is, where large money interests can go into a market and temporarily affect the trend of values one way or the other, up or down."

Mr. Griffin, the president of the Chicago Board of Trade, testifying before the House committee, said, in a formal report to his board of directors, which is published on page 157 of the hearings before the House committee, as follows:

"That manipulation of the grain markets has occurred in the past is an admitted fact. Such manipulation, however, has usually been attempted for the purpose of forcing prices upward. Manipulators have been inspired by the belief that it would be possible for them to buy a greater quantity of contract grades of grain than could be delivered at the time and place of delivery for which the contract called. At times such manipulation has been successful; more often it has failed."

It was said a great many years ago that "facts are stubborn things." However persuasive the argument may be that manipulation is possible, and however persuasive the admissions by the members of the boards of trade themselves that manipulation does exist, the most persuasive proof of it is in the actual facts.

VIOLENT FLUCTUATIONS IN THE MARKET.

Mr. President, the system of exchange now conducted by the Chicago Board of Trade is an economic monstrosity. In the business of separating men from

their money without proper return of goods or service, its market manipulators and gamblers are doing that for which hold-up men are sent to prison. No American industry other than agriculture would tolerate such a juggling of markets for a single minute. No other commodity seesaws up or down every day and every hour, month after month, as does the price of wheat on the Chicago Board of Trade. It is a great injustice to the producers of this country and a great injury to the country's welfare, progress, and stability.

I propose to cite you a few instances of fluctuations in the market which, in my judgment, can not be explained by any of the natural and legitimate forces of supply and demand. I cite these instances for two purposes: First, as showing that other forces are at work than the laws of supply and demand, which forces are and must be manipulative in character; and, second, to show that under our system as it now exists the market is unstable. Every witness who appeared at the hearings, on every side of this matter, agreed that a stable market was desirable not only for the producer but for the consumer and for every intermediate handler. The instances which I am about to show are but few of many, and I think it safe to challenge anyone to explain them by any normal play of the forces of supply and demand.

The first of these instances concerns itself with the two weeks commencing July 15, 1920. This was the first two weeks of future trading, or pit transactions, after they were abolished at the commencement of the war. All future transactions in wheat were abolished for three years—from July, 1917, to July 15, 1920. During a part of that time there was governmental control of prices. Governmental control of

prices ended on May 31, 1920. During the six weeks between June 1 and July 15, 1920, there was neither governmental control nor future trading. The extreme fluctuation in prices in that six weeks was 28 cents on any grade and 7 cents on Nos. 1 and 2 grades. This was on the Kansas City market. It was a fairly stable market. Future trading was resumed on July 15, 1920. During the next two weeks the price dropped from \$2.75 to \$2.10, a break of 65 cents, and worked back to \$2.45. In other words, a fluctuation in two weeks of nearly three times the extreme fluctuations of the preceding six weeks.

The exact figures for the Kansas City market for wheat during the six weeks between June 1, 1920, and July 15, 1920, when there was neither a Government price nor a future market, as found in the January and February, 1921, hearings before the Senate committee, are as follows:

"June 1, following the Grain Corporation's control of the grain business of the country, No. 2 hard wheat sold on the floor of the exchange in Kansas City at \$2.89 to \$2.90 per bushel. The following Monday, June 7, No. 2 hard wheat sold at Kansas City at \$2.88 per bushel. Monday, June 14, No. 2 hard wheat sold at \$2.85 per bushel; Monday, June 21, No. 2 hard wheat sold at \$2.83 per bushel; Monday, June 28, No. 2 hard wheat sold at \$2.78 per bushel; Monday, July 6, No. 2 hard wheat sold at \$2.81 per bushel; Monday, July 12, No. 2 hard wheat sold at \$2.88 per bushel; and on Thursday, July 15, the day future trading was reinstated, No. 2 hard wheat sold on the cash market at \$2.88 per bushel and the December option opened in Chicago at \$2.75 to \$2.72 and closed at \$2.70½, or 15½, cents per bushel below the cash."

From these figures it will be observed that from June 1 to July 15 the range in prices on No. 2 hard wheat was only 7 cents per bushel.

Now, if you will turn to the market after July 15, 1920, you will find the following to be the facts still on the Kansas City market:

"Monday, July 19, No. 2 hard wheat sold in Kansas City at \$2.87 per bushel, and the December option in Chicago closed at \$2.51, or 36 cents below the cash. Monday, July 26, No. 2 hard wheat sold in Kansas City at \$2.80, and the Chicago December option closed at \$2.47½. On Monday, August 2, No. 2 hard wheat sold in Kansas City at \$2.28 a bushel, or a decline of 53 cents a bushel in one week, and the December option closed at \$2.13½, or 34 cents per bushel lower than the week previous."

Mr. President, it is difficult to see in the face of these figures, realizing that the wild fluctuation of the two weeks, commencing July 15, was immediately after the stable market ending on the same day, how the facilities for hedging assist in stabilizing the market. Numerous explanations have been made by the representatives of the exchanges to account for this situation. It is probable that the facility of hedging would tend to stabilize the market if there were no outside forces at work, but the fact remains that because of the abuses at which this bill is directed hedging is becoming of little value and the market is not stable.

In part, it was the wild fluctuations following the opening of the future market, compared with the stable condition when there was no future trading, that was the immediate cause for the great wave of discontent that prompted this legislation. On the 1st day of December, 1920, in a single day wheat went down 12 cents and up 10 cents, a fluctuation of 22

cents. On December 2 it went up 17 cents and down 11 cents, and on the 3d it went down 12 cents and up 8 cents. It is impossible to ascribe to any normal and proper force a break in the market of 11 cents and a recovery of 17 cents in three or four hours. The newspapers carried the report that during these three days a half dozen speculators on the Chicago Board of Trade had profits of more than \$3,000,000, all of which was at the expense of producer and consumer. If this bill becomes a law, this manipulation of the market will not be possible.

The day the committee reported this bill out of the House the market broke 11 cents. I do not mean to say that this was a punishment visited upon the constituents of the Congress for their effrontery in undertaking to legislate; I do say that the 11-cent break can not be attributed to supply and demand.

While the committee hearings were in progress the following market situation occurred, as shown by the testimony of Rollin E. Smith, of the Bureau of Markets:

"May wheat, as the result of short selling running into stop orders and causing a loss of confidence as prices declined, was forced down 35 cents in a few weeks. The decline terminated on April 14. Then under the influence of speculative buying an advance started and continued until May 25—a bull market; a wild bull market part of the time. The advance from April 14 to May 25 was 67 cents. Then the price broke 20 cents in two days and advanced 22 cents in two days more, 19½ cents of which was on May 31.

"The net advance of the May future from April 14 to May 31 was 69½ cents. At the same time July

wheat advanced only 35 cents. May wheat was cornered, but let us see what cash wheat did.

"On May 31 Nos. 1 and 2 red and hard winter wheat, the contract grades, sold in the Chicago market at 2 cents under May, or 57 cents over July. No. 3 sold at the fixed discount of 7 cents under Nos. 1 and 2. This was 50 cents over July. No. 4, which is not deliverable on contracts at any price difference, sold at 5 cents under to 5 cents over July.

"On the next day, June 1, after the May future had expired, cash wheat sold as follows: No. 1 red and hard, 20 to 23 cents over July. This was as compared with 57 cents only the day before. No. 2 red and hard, 19 to 21 cents over July; No. 3 red and hard, 15 to 18 cents over July; No. 4 red and hard, 10 to 15 cents over July. This was a drop over night of from 34 to 37 cents for No. 1; 36 to 38 cents for No. 2; 32 to 35 cents for No. 3, but an advance of 10 to 15 cents for No. 4."

In the face of the market in May of this year it can not seriously be said that trading in futures has stabilized the market.

Mr. KING. Mr. President, may I interrupt the Senator?

The PRESIDING OFFICER (Mr. Ladd in the chair). Does the Senator from Kansas yield to the Senator from Utah?

Mr. CAPPER. Certainly.

Mr. KING. Were the fluctuations in wheat as detailed by the Senator greater than the fluctuations in the prices of other commodities and were they greater than the recorded changes, as shown upon the stock exchanges of various stocks, industrial, railroad, and so forth?

Mr. CAPPER. I have made no inquiry as that phase of the situation, but I think they were. It was very generally stated at the time of the great bear drive on the wheat market that speculators paid attention especially to wheat.

Mr. KING. There is no doubt but what there have been abuses in the grain exchanges which have injuriously affected the agricultural producers of the United States. Any sane and constitutional measure that will prevent a continuation of practices which are evil I shall gladly support. The bill before us may possess some healing virtues; at least it is to be hoped that it may bring some relief. Referring to the violent fluctuations in the prices of stocks, the Senator knows that on the New York Stock Exchange and the various stock exchanges throughout the United States this condition is almost chronic. The rise and fall has been more than 10 points within 24 hours. The rapid advances and recessions in prices have been incredible. Millions have been lost and won within a few hours.

However, in many instances, let me say, the persons who suffered were the gamblers themselves, and it did not affect the intrinsic value of the stocks nor were the railroads or the industrial concerns whose stocks were being gambled with upon the market, affected. I am inclined to think that the \$3,000,000 which the Senator said was made by a number of individuals during one day did not come from the farmers but from the "lambs" who were fleeced by the wheat brokers and gamblers. I am inclined to think the little gamblers were swallowed up by the big gamblers, and they were the ones who were compelled to add to the accretions of speculators and gamblers, whose operations were very extensive.

I have been wondering if the evil upon the grain exchanges is greater than on other exchanges, and if

the Government may regulate grain exchanges ought it not regulate all exchanges in the United States, in order that there shall be no stock gambling and no dealing in futures and no dealing in stocks except under the immediate surveillance of the United States Government? Does the Senator think that would be a good thing? I am expressing no opinion one way or the other and am only seeking the view of the Senator.

Mr. CAPPER. I think the Government might very well have supervision over stock markets and exchanges generally to some extent, but first I think we had better start with the grain exchanges because we have the proof there of the harm that is done and the injury that is being worked.

The fluctuations affect the farmer in this way: Every day while that bear raid was on and the market was fluctuating up and down millions of bushels of wheat were going to market. We can not stop, on an hour's notice, or a day's notice, the flow of wheat. The man who reached the market on the day that wheat was down, of course, was the loser. Then the grain dealer or the elevator man or the buyer at the country markets must take into account the possibility of a great fluctuation in the market price, and consequently the price he offers the producer necessarily must be less than he would offer on a stable market. For that reason we are urging conditions that will help to stabilize all the markets.

Mr. WILLIS. Mr. President, while the Senator is yielding, may I say that at some place during or after the Senator's speech I desire to get his opinion touching certain telegrams that have come to me in criticism of the pending measure. I do not desire to inject unfavorable matter into the Sen-

ator's speech at this point if he would prefer to yield at some other point, but I do desire his opinion upon the criticisms that are embodied in two or three of the telegrams which I have received, because I have great confidence in his judgment and the judgment of the Committee on Agriculture and Forestry. Would he prefer that I interrupt at another point?

Mr. CAPPER. Will the Senator wait until I shall have concluded? I shall be through in just a few moments.

Mr. WILLIS. Certainly.

Mr. CAPPER. The plain truth, Mr. President, is that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer's wheat. They sell large volumes of wheat futures short during a period before harvest when there is no great volume of buying, and the weight of their selling forces the price down. Then, by continually hammering, they hold the price there until the crop movement begins, when hedging sales place sufficient pressure upon the market to enable the speculators to buy back what they sold without advancing the price. By this process the farmer loses and the speculator wins nine times out of ten. I fear this country will not long continue to produce the finest wheat in the world if we continue to let the wheat gambler fix the price.

VICIOUS PRACTICES OF COMMISSION MEN.

Mr. President, a particularly vicious form which manipulation takes is that indulged in by commission men. By commission men I refer now to those men who place orders for future delivery for their cus-

tomers. As agents for their principals they, of course, must know and do know what trades their customers are making. Every principle of common honesty should prevent these commission men from utilizing this knowledge for their own benefit. What they do is even worse than that; they utilize this knowledge not only to benefit themselves but to benefit themselves at the expense of their customers. They sit by and watch their customers buy and, perhaps, encourage them to buy, and by the force of the buying force the market up; then these commission men, when the price is too high, jump in and break the market, ruin their customers, and make themselves rich. I quote from an article appearing in Wallace's Farmer, under date of February 11, 1921, the article being written by Rollin E. Smith, of the United States Bureau of Markets:

"Speculative commission houses, or commission houses whose members speculate, are one of the big handicaps under which the market is weighted down. It is just as unfair to the public or outside speculators for commission houses to speculate as it is for a poker player to look at the hands of his opponents, for such a commission house knows at all times just how its customers stand on the market. The public has just as much chance of winning as a poker player would if he laid his cards on the table face up. The reason is this: This professional speculator knows from long observation that 95 per cent of the outsiders lose their money. Therefore the professional—in which class are the speculative commission houses, their employees, and the brokers and scalpers in the pit—takes the other side of the market from the outsiders; not in every instance, of course, but in a large general way.

"If, for example, as often happens in a bull market, the public gets the speculative fever and buys heavily, this is of course known to the professionals. As the public becomes more and more excited and continues to buy, the professionals gradually sell out their own holdings and then closely watch for the time when the public buying exhausts itself. That will mean the end of the advance. The public is always craziest right at the top, just when they should be selling and taking their profits.

"When the force in public buying has exhausted itself, the professionals begin to sell short. If the advance is checked, they sell more. Soon the market begins to break, and then the professionals "jump on it"—sell millions of bushels; and a great slump follows. Out of the wreck a few stragglers from the public pull out with a little money left, but 95 per cent of them have left their balances with the speculative commission houses, the brokers, and the scalpers."

These are the manipulations that the bill seeks to prevent.

THE "HEDGE" MUST BE PRESERVED.

By the elimination of these abuses, it is also believed that the hedge will not only be preserved, but will be infinitely better. The foundation of all of the arguments of the grain exchanges is that the hedge must be preserved. They argue that a legitimate hedge is insurance and keeps down the margin between the producer and consumer. It is just as true that a hedge that will not work increases that margin. Where the future market on which the hedge is placed goes down while the cash goes up, the hedge is ruinous. It has been said on good

authority, and after an examination of the trend of the future and cash markets for several years, that 40 per cent of the time the hedge does not work because the cash and future do not run together. I do not vouch for that figure, but it is a statement found in Wallace's Farmer under date of March 18, 1921, the author being Mr. Rollin E. Smith. Take the market in March and April of this year. The cash advanced 65 cents and the future 35 cents during the same period. You can not use the hedge on that kind of a market. In February the cash was 35 cents over the future and in March only 8 cents over the future, and in May the future and cash came together. You can not hedge on that kind of a market. An elevator man or a grain dealer may have contracts to buy wheat in May and on account of the lack of cars or other reasons he is forced to extend the time to his customer so that the wheat is in June. If his hedge has been placed on the May option, it must then be transferred to the July option. On May 31 May wheat closed at Chicago at \$1.37½ and July wheat closed at \$1.28½.

On May 31 cash wheat sold in Chicago at 57 cents over July wheat. The next day the same wheat sold 20 to 23 cents over July, a break of 34 cents. This is attributed to the fact that there was a corner on May wheat. But you can not hedge on that kind of a market.

This has become of so frequent occurrence that hedging is becoming a dangerous instrument to play with. If the normal forces are left alone, future and cash should go hand in hand. The wild fluctuations of May of this year were because of manipulation by the great operators on the Chicago Board of Trade. It can be stopped and should be stopped.

That it can be stopped, Mr. President, and can be stopped by the boards themselves is proven by this fact: In 1911 the Chicago Board of Trade put in a rule that has practically stopped manipulation of prices upward, sometimes called "corners." This rule is a simple one; roughly, it vests the power in a committee of the board of trade to determine, in case of a corner, what the fair market value of the wheat would have been if there had been no corner. Manipulation of the price upward, or corners, is ruinous to the short sellers upon the boards of trade. The operators upon the boards of trade are victims of corners and they temporarily help the producer. Since the losses by such manipulation fall upon the members of the boards of trade themselves, more than 10 years ago they put in a rule that has stopped such manipulation. Manipulation downward only hurts the producer, the grower of the grain. The boards of trade could prevent such manipulation, as 10 years ago they prevented manipulation upward. One of the purposes of this law is to compel them to do that.

WHAT THE TESTIMONY SHOWS.

Mr. President, if the Members of this body have the opportunity to read the entire record of the hearings before the House committee in January and the same committee in April, and the hearings before the Committee on Agriculture of this body held in May, June, and July of this year, I believe that exactly this will be found to be the situation:

First. The market which governs the price paid to the farmers for their wheat and correspondingly the price paid for foodstuffs by our people in general, while controlled largely and necessarily by the law of supply and demand, is, nevertheless, seriously and

occasionally affected by the manipulation of prices and by promiscuous and unlimited gambling.

Second. These abuses are admitted by everyone, and it is likewise admitted that they should be corrected.

Third. The bodies best able to correct these evils are the exchanges themselves.

Fourth. The most enlightened and the most successful members of those exchanges admit that it would help them to correct the evils if the Government stood behind them.

Fifth. The great body of business men engaged in this business do not object to supervision, nor to punishment if they do not play the game fairly. They do object to governmental regulation.

Sixth. An analysis of the bill will demonstrate that it simply says to the boards of trade, "These are evils; you can correct them; do so; and, if you do not, you can not deal in futures."

The provisions of the bill if enacted into law will deflate gambling and speculation on the exchanges of the land. They will release the law of demand and supply and make these market places subservient to that great law of trade. They will drive out of business thousands of gamblers in puts and calls. They will turn such funds to legitimate uses and the support of industry. They will destroy the infamous influences that, attaching themselves like barnacles to the exchanges of the country, retard legitimate industry and promote vice and too often suicide and crime. And they will protect the producer, whose toil and sacrifice enable all of us to live, from the theft of his well-earned reward by the machinations of professional gamblers, forestallers, and market riggers.

This country exported 365,000,000 bushels of wheat, in the form of wheat and flour, during the 12

months ending June 30 this year. The money value of these exports of wheat was \$840,000,000, or \$2.30 a bushel. The American wheat raiser averaged something less than \$1.30 a bushel, a difference of \$365,000,000. This dollar a bushel difference, in the face of such figures, is convincing indication of a prolonged and serious interference with the operation of the great fundamental economic law of supply and demand.

We can not expect to gather grapes from thistles. So long as this juggling of the markets is permitted, and so long as this cancer of gambling in one of the necessities of life is permitted, we can not expect to have permanent prosperity in the United States. For years previous to the present crisis in the agricultural industry the men frequently referred to by orators as the "backbone of the Nation" have averaged barely more than a decent living by working their wives and children as well as themselves, and have realized no return from their capital. The real job we have on our hands is to find out how farming can be made as safely profitable as any other American occupation. Unless that can be done it is simply a question of time when our farmers will be forced to abandon a too hazardous means of livelihood. The one vital industry on which the Nation's welfare and prosperity depend must have its chance to live and prosper if the rest of us expect to, and if it is to have this chance, the grain gambler must go.

In conclusion, Mr. President, I submit this one thought for the serious consideration of this body. There can be no more solemn duty resting upon the Congress of the United States than to preserve to the farmer and the consumer the free play of economic

laws upon the prices which they get for their product and upon the price which the consumer pays for his bread. There is not that free play now. The abuses are certain, definite, and admitted. They can be corrected and will be corrected, if this bill is passed, without Government regulation, but if any situation is serious enough to justify even governmental regulation the measure now before the Senate meets that situation. As now conducted, the Chicago Board of Trade is the most wanton and the most destructive game of chance in the world. The bill now before you is a legislative mandate to these great exchanges, that if they wish to continue to deal in futures without restriction or regulation, they must eliminate from their midst the man who thrives upon the losses of the gamblers in foodstuffs; they must suppress the man who profits by the circulation of falsehoods affecting the price of wheat and bread; and they must drive from their midst the man who is prostituting the machinery of the grain market for his own selfish purpose by manipulating the price to his own advantage. The bill, in my judgment, is constructive legislation, legislation that has been sorely needed for more than a quarter of a century. If I read the public mind aright, the American people have determined to do away with every serious mischief-making evil that affects the general welfare. They have known about market gambling for a long time, thousands have been "stung" by it. They have their minds about made up that the Chicago Board of Trade's poker playing with the food supply is the most wanton, most wicked, and most destructive game of chance in the world, and they are going to stop it.



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OPINION

HILL, JR., ET AL. v. WALLACE, SECRETARY OF
AGRICULTURE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 616. Argued January 11, 12, 1922.—Decided May 15, 1922.

1. Members of an incorporated board of trade have standing to maintain a bill against its president and directors to restrain them from complying with an unconstitutional act of Congress threatening seriously to impair the value of the board to its members and the value of their memberships, when the directors have refused to bring the suit for fear of antagonizing government officials. P. 60.
2. Section 3224 of the Revised Statutes forbidding suits to restrain collection of a tax *held* inapplicable to this case because of its exceptional and extraordinary circumstances. P. 62. *Dodge v. Brady*, 240 U. S. 122.
3. The Act of August 24, 1921, c. 86, 42 Stat. 187, known as the Future Trading Act, is in purpose, in essence and on its face a regulation of the business of grain boards of trade, with a heavy penalty, called a tax, imposed on sales of grain for future delivery to coerce boards and their members into compliance with the regulations, and, therefore, it cannot be sustained as an exercise of the taxing power of Congress, insofar as concerns this so-called tax and the regulations related to it. P. 66. *Child Labor Tax Case*, *ante*, 20.
4. Neither are the tax and related regulations sustainable under the Commerce Clause. P. 68.
5. Sales of grain for future delivery made at Chicago between the members of a board of trade, to be settled there by off-setting purchases or by delivery of warehouse receipts for grain there stored, are not in themselves interstate commerce and cannot come within the regulatory power under the Commerce Clause unless they are regarded by Congress, from the evidence before it, as

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directly interfering with interstate commerce so as to obstruct or burden it. P. 68.

6. A direction in an act that, if any of its provisions or the application thereof to any person or circumstance be held invalid, the validity of the remainder of the act or the application of such provision to other persons and circumstances shall not be affected, is an assurance that separable valid provisions may be enforced consistently with legislative intent, but does not and cannot empower the courts to amend inseparable provisions of the act by inserting limitations which it does not contain. P. 70.
7. Under § 11 of the Future Trading Act, *supra*, directing severance of valid from invalid provisions and applications, § 9, which authorizes investigations by the Secretary of Agriculture, and, *semble*, § 3, imposing a tax on certain kinds of options of purchase or sale of grain, are unaffected by the conclusion that § 4, imposing the tax on sales for future delivery, and the regulations interwoven with it in subsequent sections, are invalid. P. 71.

Reversed.

This is a suit attacking the validity of the Future Trading Act, approved August 24, 1921, c. 86, 42 Stat. 187. The act imposes a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery, but excepts from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the act.

The bill is filed by eight members of the Board of Trade of the City of Chicago, who sue in behalf of all other members of that body who may wish to join and share in the relief granted, against the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States District Attorney for the Northern District of Illinois, the Collector of Internal Revenue for the first district of that State, the Board of Trade of the City of Chicago, its president, vice-presidents and directors. The bill avers that the appellants applied to the Directors of the Board of Trade to institute a suit to have the Future Trading Act adjudged unconstitutional before they should comply with

it, but the Board of Directors refused to take any steps, and announced that they intended to comply with the provisions of the act; that the Board refused because they feared to antagonize the public officials whose duty it was to construe and enforce the act, and the complainants feared that, acting under the coercion imposed upon them by the act, the Board of Directors would admit to membership on the Board the representatives of the coöperative associations of producers; that the Secretary of Agriculture would designate such Board as a contract market, and that such action by the Board of Directors would cause irreparable injury to the complainants and all the other members of the Board. Complainants set out the character of the Board of Trade of Chicago and its organization as a corporation under a special charter of the State of Illinois in 1859, by which certain persons engaged in the purchase and sale of grain were created a corporation and given power to admit members, and expel them, to adopt regulations and by-laws for the management of the business and the mode in which it should be transacted; to appoint committees of arbitration for the settlement of differences between the members; to appoint persons to examine, measure, weigh, gauge, inspect, grain and other articles of produce, with authority to issue a certificate as to quality or quantity; and to make the brand or mark thereof evidence between any buyer and seller assenting to the employment of such person, and to do and carry on business usual in the management of boards of trade.

The bill avers that the Board has 1610 members, of whom the complainants are members in good standing; that its memberships are salable for more than \$7,000 apiece; that in recent years there have been organized in most of the grain-producing States, among so-called farmers, coöperative societies who desire to market their crops at actual cost and to market them through the exchanges

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at actual cost, and without paying the commissions charged by the members of such exchange; the plan being to sell all grain through an authorized member of such organization admitted to the exchange who shall charge the prescribed commission and ultimately rebate back to the members of such organization the aggregate of such commissions after paying his salary and incidental expenses, on the basis of the number of bushels of grain which each producer has sold through said organization; that the admission of such representatives of coöperative societies to the Chicago Board of Trade would destroy the business of its members, and the value of the memberships, and make it difficult for the Board to maintain sufficient members to pay the assessments to meet the expenses of its maintenance; that many of its members engage in making contracts with other members for the purchase and sale of grain for future delivery; that during the years from 1884 to 1913, wheat of the grade contemplated in the contracts for future delivery on the Board sold as low as $48\frac{7}{8}$ cents per bushel, and never for more than \$2.00 per bushel; and that during most of said time its price was below \$1.00; that during the same years corn sold as low as $19\frac{1}{2}$ cents a bushel, and never higher than \$1.00, and most of the time sold below 60 cents; that oats sold as low as $14\frac{3}{4}$ cents per bushel and never higher than $62\frac{1}{2}$ cents, and much the greater part of said period under 40 cents per bushel; that, at the time of the filing of the bill, contract wheat was selling for \$1.05 per bushel, and that no member of the Board could afford to make contracts for future delivery and pay the tax thereon imposed by the Future Trading Act of 20 cents a bushel; that the law in effect prohibits all those who are not members of a board of trade, which has been designated by the Secretary of Agriculture a contract market under said act, from making any contracts of sales for future delivery.

The bill charges that the Future Trading Act violates the Constitution of the United States (1) in depriving the members of the Board of their property without due process of law, in the compulsory admission to membership on said board of representatives of the coöperative associations of producers, in accord with § 5 of the act; (2) in that it attempts to regulate commerce, which is not commerce with foreign governments or among several States, but is commerce wholly between persons contracting within the State of Illinois respecting the purchase or sale of grain which forms a part of the common property of that State, and is intrastate and not interstate; (3) in that it violates the Tenth Amendment to the Constitution, by interfering with the right of the State of Illinois to provide for and regulate the maintenance of grain exchanges within its borders upon which are conducted the making of contracts which are merely intrastate transactions.

The bill avers the complainants are not in collusion with defendants or any of them to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have jurisdiction; and that the amount involved in the matters in dispute is, exclusive of interest and costs, more than \$3,000.

The decrees prayed for are:

To enjoin the Secretary of Agriculture from taking any steps to induce or compel the Board of Trade or its directors to comply with the provisions of the act;

To enjoin the Commissioner of Internal Revenue, the Collector of Internal Revenue and the District Attorney named as parties from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, under the act; and

To enjoin the Board of Trade and each of its officers and directors from applying to the Secretary of Agriculture to have the Board designated as a contract market

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under the act, and from admitting to membership into such board any representative of any coöperative association of producers in compliance with § 5 of the act, or from taking any other steps to comply with the act.

The Board of Trade and its president, its officers and directors moved to dismiss the bill of complaint on the ground that it was without equity on its face and did not state facts sufficient to constitute a cause of action in a court of equity.

The Secretary of Agriculture appeared specially to move the court to dismiss the suit as to him because he was not a resident of the Northern District of Illinois and had not been served with process, and the court had no jurisdiction over him.

The United States Attorney for the Northern District of Illinois, and the Collector of Internal Revenue, moved the court to dismiss on the grounds that the suit was to restrain the collection of a tax contrary to § 3224 of the Revised Statutes; and that the bill sought to restrain the enforcement of a criminal statute without showing that the complainants suffered irreparable injury. The District Court denied the motion for a temporary injunction and ordered that the bill be dismissed as to all the defendants for want of equity.

Mr. Henry S. Robbins for appellants.

The provision of the Future Trading Act (§ 5-e) requiring the exchange to admit to membership any duly authorized representative of a coöperative association of producers, and sanctioning "patronage dividends," deprives the Board of Trade and its members of their property without due process of law.

The provisions which aim to regulate boards of trade are not within the commerce power of Congress.

Congress by the title has said that parts of this act are not the exercise of the taxing power, and has left this

court free to treat as the exercise of the commerce power those provisions which are clearly regulatory in character.

The question whether the provision of § 5-e which modifies the commission rule of the exchange in the interest of coöperative associations of producers is within the commerce power is answered in the negative in *Hopkins v. United States*, 171 U. S. 578.

All contracts for future delivery of grain made by or through members of this Board are made in its exchange room in Chicago during certain market hours only, and the only parties to these contracts are members then and there present. Less than one-quarter in volume of these contracts are performed by delivery, and upon such contracts the delivery is of warehouse receipts entitling the holders to receive a specified number of bushels of grain of a particular grade out of a larger common mass in store. These receipts on their face state that the grain, for which they are issued, has been mixed with other grain of the same grade; and when the receipt holder calls for his grain, the warehouseman, to comply with the state law, makes delivery out of the grain that has been longest in store. If any component parts of the common mass of grain out of which the receipt is filled have come from other States, they have completely lost their interstate character by this inter-mixing. Such contracts for the future delivery of grain are not interstate commerce. *Ware & Leland v. Mobile County*, 209 U. S. 405. See also *Engel v. O'Malley*, 219 U. S. 139; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, 511; *Hopkins v. United States*, 171 U. S. 578; *Brown v. Maryland*, 12 Wheat. 419; *May v. New Orleans*, 178 U. S. 496; *Austin v. Tennessee*, 179 U. S. 343; *Purity Extract Co. v. Lynch*, 226 U. S. 192; *Weigle v. Curtice Bros. Co.*, 248 U. S. 285; *Public Utilities Commission v. Landon*, 249 U. S. 236; *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230; *Askren v. Continental Oil Co.*, 252 U. S. 444.

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Contracts which by their terms contemplate the shipment of grain across state lines are, of course, interstate commerce. But the purpose or intention of some of the purchasers in this future trading upon this exchange to ship out of the State property they purchase does not make their contracts for future delivery made in these "pits" interstate contracts. And if one such contract is not, a large number of such contracts do not constitute interstate commerce. *United States v. Knight Co.*, 156 U. S. 1, 13; *Coe v. Errol*, 116 U. S. 517; *New York Central R. R. Co. v. Mohney*, 252 U. S. 152; *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 151; *Bacon v. Illinois*, 227 U. S. 504, 516; *Merchants Exchange v. Missouri*, 248 U. S. 365; *Hammer v. Dagenhart*, 247 U. S. 251; *Crescent Oil Co. v. Mississippi*, 257 U. S. 129. All this future trading, therefore, should be regarded as intrastate commerce, the regulation of which is not within the commerce power of Congress.

We have here a non-profit corporation created by a State, which does no business itself and whose chief function is to furnish in Chicago an exchange hall where its members individually may conveniently and economically transact business. To that end it provides for the admission as members of only such persons as seem to it to be fit in point of character and financial responsibility, it provides a method by which members, who default on their contracts or otherwise misbehave, may be suspended or expelled, it provides rules respecting the terms of the contracts made by its members in the absence of express stipulations to the contrary, it provides arbitration committees to decide the business disputes of its members, and it promulgates and enforces rules to control the business relations of its members to each other and to the exchange itself. Should all these be treated as together constituting an instrumentality, which is but an aid to commerce?

Much the larger part of the trading between members in the exchange hall is so-called future trading, which, as already shown, is not interstate commerce. Another substantial part of the trading in the exchange hall is that of members who, as agents, receive grain on consignment to sell and account for the proceeds or buy grain as agents which, so far as the business of these agents is concerned, has been held by this court not to be interstate commerce. The bidding for, or offering, grain by letters or telegrams sent by members is in no sense a part of the trading on the exchange. Hence, if any, only a minor part of the total volume of trading on this exchange possesses any of the characteristics of interstate commerce.

From the foregoing facts does not the conclusion arise that the maintaining of this exchange hall—and everything that the Board does in connection therewith—lacks any element of interstate commerce within the definition that this court has frequently given to that term? Hence, is not Congress without power to regulate this exchange? Such seems to have been the practical construction of state and federal legislators for more than one hundred years prior to the passage of the Future Trading Act. *Hopkins v. United States*, 171 U. S. 578, seems to support the view here urged. Also, *Nathan v. Louisiana*, 8 How. 73, 80.

The Board of Trade, in furnishing a building where traders meet to make contracts—only a small portion of which relate to grain which has, before the sale on the exchange is made, come across state lines, or is to go across state lines after it reaches the purchaser on the exchange—seems to have no more connection with interstate commerce than have the owners of the grain-mixing warehouses of Chicago, which store much grain that has come from, or is to go to, other States. *Munn v. Illinois*, 94 U. S. 135; *Covington Bridge Co. v. Kentucky*, 154 U. S. 213; *Budd v. New York*, 143

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U. S. 517, 545. See *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648; *New York Life Insurance Co. v. Cravens*, 178 U. S. 389; *Merchants Exchange v. Missouri*, 248 U. S. 365; *Brodnax v. Missouri*, 219 U. S. 285; *House v. Mayes*, 219 U. S. 270; *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590; *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436; *Williams v. Fears*, 179 U. S. 270; *Cargill Co. v. Minnesota*, 180 U. S. 452, 470; *Ficklen v. Shelby County Taxing District*, 145 U. S. 1; *United States Fidelity Co. v. Kentucky*, 231 U. S. 394.

It is not here claimed that, if elevator or board of trade does some act, which prejudicially touches, or will interfere with interstate commerce—as was claimed of a rule of this Board in *Chicago Board of Trade v. United States*, 246 U. S. 231, or if members of an exchange conspire to run a corner “affecting the entire trade of the country” in a particular commodity, as in *United States v. Patten*, 226 U. S. 525,—Congress may not, as to such encroachments, enact a prohibiting act. All that we do contend is that—considering together this Board of Trade and all its activities—the general regulation thereof as respects admissions to membership, commission rates, what, if any, memoranda of contracts should be made, etc., should be held to be a part of intrastate commerce, and within the exclusive power of the State. *Hammer v. Dagenhart*, 247 U. S. 251, 273, 275.

The Constitution expressly limited the taxing power of Congress to certain purposes—which were necessarily expressed in general terms. It conferred on Congress the “power to lay and collect taxes, duties, imposts and excises, to pay [for the purpose of paying] the debts and provide [providing] for the common defense and general welfare of the United States.”

The protective tariff was then an established governmental system in England and elsewhere, and doubtless

the Constitution contemplated that in the laying of imposts Congress might fix the duties with a view to excluding importation rather than raising revenue.

But there is no warrant for saying that at that time the power to lay internal taxes had any other legitimate purpose than the raising of revenue; or that the States, in conferring on the National Government a concurrent power to levy taxes, ever contemplated that Congress might exercise that power for any other purpose than to raise revenue.

This, we think, is apparent for this reason: Under its then existing constitution each State had unlimited power to regulate the commercial and other transactions of its citizens. Resort to a roundabout way of doing this through the levying of taxes was not necessary. This is also true of the governments of Europe. There was nowhere any dual system of government requiring a written constitution to accurately separate and define the powers that belong to each of the separate governments, and hence no occasion or incentive to use the taxing power as a cloak to accomplish something other than getting revenue.

Indeed, does anyone suppose that—considering the pronounced disinclination of the States to surrender their own powers—the Constitution would have been adopted by the requisite number of States, if John Marshall in Virginia and Alexander Hamilton in New York, had responded affirmatively to the question, whether the proper exercise of power to tax thus to be conferred, included also the power to regulate, or to prohibit each State from regulating, its internal trade and other local affairs?

In *McCulloch v. Maryland*, 4 Wheat. 316, 431, in deciding that a state statute, providing a tax on a branch of the United States Bank, was an illegal encroachment upon this federal power, this court made use of the expression, "that the power to tax involves the power to

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destroy." This was only a way of saying that any state taxing-statute might impair the federal power. It was a mere phrase, used argumentatively and not to support a federal statute, but to annul a state statute. In *Veazie Bank v. Fenno*, 8 Wall. 533, the power of Congress to impose a tax on the notes of a state bank was upheld upon the ground that it was the proper exercise of the power to provide a circulation of coin and to authorize the emission of letters of credit, although it was also stated—in answer to the argument that the tax was so excessive as to indicate the purpose of Congress to destroy the bank's franchise—that the court could not pronounce the law unconstitutional for the reason "that the tax was excessive." With this as a basis, this phrase of Chief Justice Marshall—that the power to tax involves the power to destroy—has now become in the minds of many in and out of Congress a fixed legal maxim, by which the powers of Congress are to be measured. Congress now treats it as fully warranting the use of the taxing power to regulate or prohibit whatever it may not otherwise regulate or prohibit.

But Congress has not always thought that the power to tax implied the power to regulate or destroy. In 1892 a bill passed one House of Congress, commonly known as the "Hatch Anti-Option Bill," which—like the present act—excepted from its provisions contracts for future delivery of grain when made by farmers. It imposed a tax of 20 cents a bushel on all other contracts for the future delivery of grain, required every person engaged in the business of making such contracts to take out a license, and required that the terms of all such contracts should be in writing, and be recorded in books. The purpose was, by the size of the tax, to suppress all future trading. But it was defeated in the Senate, largely by the arguments against its constitutionality. One of these was by Senator (afterwards Chief Justice) White, who argued

that the bill was "flagrantly unconstitutional legislation." 39 Cong. Rec. 6513, 6515-6517.

This court was not yet decided that where, as here, the law does not profess to be solely a taxing measure, but by its title and its terms is also a law regulating something which it is beyond the power of Congress to regulate, the statute must be sustained under the taxing power. To so hold would be to shut one's eyes to the real purpose of the law, when Congress had disclosed that motive and purpose in the terms of the statute.

Distinguishing: *McCray v. United States*, 195 U. S. 27; *United States v. Dewitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *United States v. Doremus*, 249 U. S. 86, 93.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, *Mr. R. W. Williams*, and *Mr. Fred. Lees* were on the brief, for appellees.

"Trading in futures" and the evils attendant thereupon are subjects with which both legislative and judicial bodies have long been familiar. If extraneous light for the proper interpretation of the statute is helpful, the "history of the times" or "the environment at the time of the enactment of a particular law—that is, the history of the period when it was adopted"—may be resorted to. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

As to the history and purposes of the act see: Report of Federal Trade Commission on the Grain Trade, September 15, 1920, vol. I, p. 315; Report, Senate Committee on Agriculture, 67th Cong., 1st sess., Sen. Rep. No. 212; Appendix D, statement of Senator Capper, August 9, 1921, 61 Cong. Rec., pp. 5220-5227.

The court has long been familiar with the organization of the Chicago Board of Trade and its methods of trans-

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acting business. *Nicol v. Ames*, 173 U. S. 509; *Clews v. Jamieson*, 182 U. S. 461; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236; *Chicago Board of Trade v. United States*, 246 U. S. 231. The Supreme Court of Illinois has frequently considered the same subjects. *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33; *Pearce v. Foote*, 113 Ill. 228; *Cothran v. Ellis*, 125 Ill. 496; *New York & Chicago Grain & Stock Exchange v. Board of Trade*, 127 Ill. 153; *Schneider v. Turner*, 130 Ill. 28; *Soby v. People*, 134 Ill. 66; *Central Stock Exchange v. Board of Trade*, 196 Ill. 396; *Weare Commission Co. v. People*, 209 Ill. 528, affirming 111 Ill. App. 116; *Board of Trade v. Dickinson*, 114 Ill. App. 295.

The motives of Congress in laying the tax and fixing the amount of it may not be inquired into. *McCray v. United States*, 195 U. S. 27, 59; *Hammer v. Dagenhart*, 247 U. S. 251, 276; *Treat v. White*, 181 U. S. 264, 269; *Fletcher v. Peck*, 6 Cr. 87, 130, 131; *Lottery Cases*, 188 U. S. 321. In the last cited case the commerce power was used to discourage gambling in lotteries as the taxing power is now used to discourage gambling in the greatest staple of commerce.

The fact that the tax may be burdensome even to the extent of causing the discontinuance of the particular business affected will not influence the court in reaching its judgment. *Patton v. Brady*, 184 U. S. 608, 623; *Spencer v. Merchant*, 125 U. S. 345, 355; *Alaska Fish Co. v. Smith*, 255 U. S. 44, 48.

The provision for admission to membership in the Board of Trade of a representative of a coöperative association is not a taking of property without due process of law.

The Future Trading Act is essentially a taxing statute. This is not less so even if the court assumed that the tax was prohibitive, but there is nothing before the court which would justify the belief that the tax is prohibitive.

The provisions, other than that which imposes the tax, are merely a method of classification. The power to classify subjects for taxation, in order to determine when the tax is imposed and when it is not, is certainly as great or greater than the like power of classification in the exercise of any other constitutional power. This being so, the propriety of the classification in this instance is justified in the case of *Lewis Publishing Co. v. Morgan*, 229 U. S. 288. See *McCray v. United States*, 195 U. S. 27, 61, 62; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 158; *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 418; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Tanner v. Little*, 240 U. S. 369, 382; *Alaska Fish Co. v. Smith*, 255 U. S. 44, 48, 49.

Precedents for the classification made by the Future Trading Act are found in other statutes, the constitutionality of which has been upheld by this court. The oleo-margarine tax; the tax on sugar refineries, excepting farmers and planters grinding and refining their own molasses; the tax on state bank notes, inapplicable to national bank notes; the tax on phosphorus matches but not on other matches; the tax on sales of boards of trade but not sales made elsewhere.

The tax is not a direct tax upon the property but a tax on the privilege of selling the property for future delivery. *Nicol v. Ames*, 173 U. S. 509, 519, 520; *Thomas v. United States*, 192 U. S. 363, 371.

The tax is uniform throughout the United States and therefore within the constitutional requirement.

For a hundred years the use of the taxing power has not been limited to the raising of revenue alone, but, through the protective tariff, has been employed to encourage industries in this country. In the application of the tariff, Congress has looked to the "general welfare" of the country, as is done in the case of the Future Trading

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Act, and not merely to the raising of revenue. In laying a tax, Congress necessarily uses discretion, imposing the burden upon those objects which are least useful or valuable to the public, or perhaps even hurtful to its interests, thereby aiding and encouraging those objects which are of greater use or value to the public. The use of the taxing power to promote the moral welfare of the nation—as the heavy duties on liquors or tobacco—is as old as the taxing power. The tax imposed by the Future Trading Act puts the burden upon the least necessary and perhaps the harmful transactions affecting the grain market of the country, and at the same time provides for the making of the transactions necessary to the growers and users of grain.

Even though the tax may be heavy enough to cause discontinuance of the present manner of conducting the business, still a reasonable method of preserving the business, and one which Congress believes is for the public welfare, is provided. The price of cash grain is influenced by quotations on the future markets. If, for reasons peculiar to exchange methods and transactions, the price of futures is depressed unduly, as frequently happens, by conditions not in anywise connected with the total available supply of grain or the demand therefor, an indefensible economic and commercial condition arises, harmful to all persons owning or dealing in cash grain, including not only the farmer, but the grain merchant as well. That the taxing power may be used in this way is well settled. *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237; *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49.

Precedents are to be found in the Cotton Futures Act, August 11, 1916, 39 Stat. 446, 476; the Warehouse Act, August 11, 1916, 39 Stat. 486; the Cotton Futures Act (as originally enacted,) August 18, 1914, 38 Stat. 693, upheld in *Hubbard v. Lowe*, 226 Fed. 135, 137.

The supertax is not a new device in the history of our legislation. It was as long ago as 1866 applied to the

circulation of state bank notes (14 Stat. 146); in 1886, to the sale of artificially colored oleomargarine (24 Stat. 209; 32 Stat. 193), and in 1912, to the manufacture of phosphorus matches (37 Stat. 81). The first of these two statutes was sustained in *Veazie Bank v. Fenno*, 8 Wall. 533, and the second in *McCray v. United States*, 195 U. S. 27.

The taxing power of Congress is not limited to the purpose of raising revenue. Story, Const., §§ 965, 973.

Congress could lay a tax on the privilege of doing a warehouse business and except warehouses operated under federal license, as it did by the Warehouse Act of August 11, 1916. The Future Trading Act does no more than this except that the two provisions—the laying of the tax and the means of avoiding it—are combined in one act. The State is still left free to legislate as it pleases with reference to future trading. Designation as a contract market would not authorize the Board of Trade or its members to violate any state law; on the contrary, they would have to comply with it. See *United States v. Doremus*, 249 U. S. 86, 92.

The Future Trading Act may readily be sustained as an act to regulate commerce. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 247; *Otis v. Parker*, 187 U. S. 606, 609; *Chicago Board of Trade v. United States*, 246 U. S. 231.

An exchange which deals in the purchase and sale of more grain than the whole world either produces or consumes must have a very real relation to interstate and foreign commerce. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

MR. CHIEF JUSTICE TAFT, after making the foregoing statement of the case, delivered the opinion of the court.

The first question for our consideration is whether, assuming the act to be invalid, the complainants on the

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face of their bill state sufficient equitable grounds to justify granting the relief they ask. We think it clear that within the cases of *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 10; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, and *Dodge v. Woolsey*, 18 How. 331, 341, 346, the averments of the bill entitle them to relief against the Board of Trade of Chicago, its president and its directors. The bill shows that the act, if enforced, will seriously injure the value of the Board of Trade to its members, and the pecuniary value of their memberships. If the law be unconstitutional, then it was the duty of the Board of Directors to bring an action to resist its enforcement. It is quite like the case of *Dodge v. Woolsey*, in which the court said with respect to a similar refusal (p. 345):

"Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not 'an error of judgment merely,' and cannot be so called in any case."

The averments of the bill are that the Board of Directors refused the request to bring the suit because they feared to antagonize the public officials whose duty it was to construe and enforce the act, and not because they thought the act was constitutional. They must be taken to have admitted this by the motion to dismiss.

In *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635, and in *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, thought to cast doubt upon the sufficiency of the averments made herein to sustain complainants' right to file the bill, there had been no request made of the corporation or the Board of Directors to bring suit and no refusal, both of which are present in the case at bar.

A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of § 3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S. 123; *Ohio Tax Cases*, 232 U. S. 576, 587; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 82. Does § 3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge v. Brady*, 240 U. S. 122, 126, that § 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge v. Osborn*, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make § 3224 inapplicable. The right to sue for an injunction against the

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taxing officials is not, however, necessary to give us jurisdiction. If they were to be dismissed under § 3224, the bill would still raise the question here mooted against the Board of Trade and its directors. The Solicitor General has appeared on behalf of the Government and argued the case in full on all the issues. Our conclusion as to the validity of the act will, therefore, have the same effect as did the judgment of the court in respect to the income tax law in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, to which the Government was not a party but in which the Attorney General on its behalf was heard as *amicus curiae*.

The act whose constitutionality is attacked is entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and *providing for the regulation of boards of trade*, and for other purposes." (Italics ours.)

Section 4 imposes a tax, in addition to any imposed by law, of 20 cents a bushel involved in every contract of sale of grain for future delivery, with two exceptions. The first exception is where the seller holds and owns the grain at the time of sale, or is the owner or renter of land on which the grain is to be grown, or is an association made of such owners or renters. The second exception is where such contracts are made by or through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market, and are evidenced by a memorandum containing certain particulars to be kept for a period of three years or as much longer as the Secretary of Agriculture shall direct and to be open to official inspection. This tax on sale contracts for future delivery is in addition to a tax now imposed by the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057, 1136, Title XI, Schedule A, of 2 cents on every hundred dollars in value of such sales.

Section 5 authorizes the Secretary of Agriculture to designate boards of trade as contract markets when and

only when such boards comply with certain conditions and requirements, as follows:

a. When located at a terminal market where cash grain is sold in sufficient amount and under such conditions as to reflect the value of the grain in its different grades, and where there is recognized official weighing and inspection service;

b. When the governing body of the Board adopts rules and enforces them, requiring its members to make and keep the memorandum of all transactions in grain whether cash or for future delivery as directed by the Secretary;

c. When the governing body prevents the dissemination by the Board or any member thereof of false, misleading, or inaccurate reports, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

d. When the governing board provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

e. When the governing body admits to membership on the Board and all its privileges any authorized representative of any lawfully formed and conducted coöperative associations of producers having adequate financial responsibility; "*Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among bona fide members of any such coöperative association."

f. When the governing body of the Board shall make effective the orders and decisions of the commission appointed under § 6.

Section 6 provides that any board of trade desiring to be designated as a contract market shall apply to the Secretary of Agriculture, with a showing that it complies with the conditions already stipulated in § 5, and a sufficient assurance of future compliance. The section ap-

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points a commission of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, who may, after due notice to the officers of the Board, suspend for six months or revoke the designation of any board as a contract market, upon a showing of failure to comply with the requirements of § 5.

Provisions are made for an appeal from this order to the Circuit Court of Appeals, and appeal is granted to the commission from the refusal of the Secretary of Agriculture, upon application, to designate any board as a contract market.

Section 6 also provides that if the Secretary of Agriculture has reason to believe that any person is violating any provisions of the act or is attempting to manipulate the market price of grain in violation of the provisions of § 5, or any of the rules or regulations made pursuant to its requirements, he may have served upon such persons a complaint for a hearing before a referee, to take evidence, to be transmitted to the Secretary as chairman of the commission, and the commission may, after a finding of guilt, issue an order requiring all contract markets to refuse such person trade or privileges. This order may be revised in the Circuit Court of Appeals.

Section 7 provides that the tax imposed shall be paid by the seller and shall be collected either by affixing stamps or by such other method as may be prescribed by the published regulations of the Secretary of the Treasury.

Section 10 provides a penalty for any person who shall fail to evidence the contract of sale he makes by memorandum or to keep the record of it, or to pay the tax as provided in §§ 4 and 5, with a penalty of 50 per cent. of the tax and a punishment as a misdemeanor and a fine of \$10,000, with imprisonment for one year or both and the costs of the prosecution.

It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. As the bill shows, the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome. The tax upon contracts for sales for future delivery under the Revenue Act is only 2 cents upon \$100 of value, whereas this tax varies according to the price and character of the grain from 15 per cent. of its value to 50 per cent. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. Even if we conceded, as we do not, that the keeping of a memorandum and of the particulars of each sale as a record for three years or more, not only of contracts for future delivery, but also of cash sales, neither of which are subject to tax in designated boards of trade, would help taxing officers in any way to detect the evasions of this tax outside of such boards, no such construction can be put upon the provisions which require the board of trade to prevent a dissemination of false or misleading reports or to prevent the manipulation of prices or the cornering of grain or which enforce the admission to membership in the Board of the representatives of co-operative associations of producers or the abrogation of rules against rebate as applied to such representatives. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all "futures" to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the pro-

visions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by the commission of violations of these regulations, with the withdrawal by the commission of the designation of the Board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

Our decision, just announced, in the *Child Labor Tax Case*, ante, 20, involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like *Veazie Bank v. Fenno*, 8 Wall. 533, and *McCray v. United States*, 195 U. S. 27, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the State, with a heavy exaction to promote the efficacy of such regulation. We there say (pp. 37, 38):

“Out of a proper respect for the acts of a coördinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of

public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing can not be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I.

We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State. *House v. Mayes*, 219 U. S. 270; *Brodnax v. Missouri*, 219 U. S. 285. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not

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introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

In *Ware & Leland v. Mobile County*, 209 U. S. 405, it was held that contracts for the sale of cotton for future delivery which do not oblige interstate shipments are not subjects of interstate commerce, and that a state tax on persons engaged in buying and selling cotton for future delivery was not a regulation of interstate commerce or beyond the power of the State.

It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. *United States v. Ferger*, 250 U. S. 199. It was upon this principle that in *Stafford v. Wallace*, 258 U. S. 495, we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.

So, too, in *United States v. Patten*, 226 U. S. 525, it was held that though this court, as we have seen, had decided in the *Ware & Leland Case* that mere contracts for sales of cotton for future delivery which did not oblige interstate shipments were not interstate commerce, an indictment charging the defendants with having cornered the whole cotton market of the United States by excessive purchases of cotton for future delivery and thus conspired to restrain, obstruct and monopolize interstate

commerce in cotton, was sustained under the first and second sections of the Sherman Anti-Trust Law. This case, like *Stafford v. Wallace*, followed the principles of *Swift & Co. v. United States*, 196 U. S. 375. But the form and limitations of the act before us form no such basis as those cases presented for federal jurisdiction and the exercise of the power to protect interstate commerce. Our conclusion makes it necessary for us to hold § 4 and those parts of the act which are regulations affected by the so-called tax imposed by § 4, to be unenforceable.

Section 11 of this act directs that "if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States v. Reese*, 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

"We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be deter-

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mined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Trade-Mark Cases, 100 U. S. 82; *Butts v. Merchants & Miners Transportation Co.*, 230 U. S. 126.

To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

There are sections of the act to which under § 11 the reasons for our conclusion as to § 4 and the interwoven regulations do not apply. Such is § 9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion. It provides:

"That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as 'privileges,' 'bids,' 'offers,' 'puts and calls,' 'indemnities,' or 'ups and downs.'"

This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling or offer full opportunity for it and does not seem to be associated with § 4. Such a tax without more would seem to be within the congress-

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sional power. *Treat v. White*, 181 U. S. 264; *Nicol v. Ames*, 173 U. S. 509; *Thomas v. United States*, 192 U. S. 363. But these are questions which are not before us and upon which we wish to express no definite opinion.

The injunction against the Board of Trade and its officers, and the injunction against the Collector of Internal Revenue and the District Attorney, should be granted, so far as § 4 is concerned and the regulations of the act interwoven within it. The court below acquired no personal jurisdiction of the Secretary of Agriculture and the Commissioner of Internal Revenue by proper service and the dismissal as to them was right.

The decree of the District Court is reversed, and the cause is remanded for further proceedings in conformity to this opinion.

MR. JUSTICE BRANDEIS, concurring.

I agree that the Future Trading Act is unconstitutional; but I doubt whether the plaintiffs are in a position to require the court to pass upon the constitutional question in this case. It seems proper to state the reasons for my doubt.

In essence this is a suit by eight members of the Chicago Board of Trade to prevent its directors and officers from accepting the offer of the Government to designate it a "contract market." The act does not require the corporation to become a "contract market." If—and only if—it elects to become such, must its rules, and the conduct of its business, conform to requirements prescribed by the act or the Secretary of Agriculture. In that event its members may likewise be subjected individually to some slight additional trouble and expense; for the Secretary of Agriculture may require a more detailed record of transactions than is ordinarily kept and may require that the records be preserved three years. Members may, in that event, also suffer individually some loss of business

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through the competition of representatives of producers coöperative organizations who are to be admitted to the privileges of the exchange if it becomes a "contract market." On the other hand, by acceptance of the designation as a "contract market" members of the Board of Trade would be relieved from all danger of liability for taxes on their future trading; and if the act is enforced generally, the profits of the individual members may increase largely; because the general public, being debarred by the act from gambling on futures in bucket shops, will naturally turn to the few "contract markets" when desiring to speculate in futures.

To decide whether the corporation and its members will be benefited or injured by its becoming a "contract market" is a matter calling for the exercise of business judgment. The charter vests in the directors and managers broad powers; and, so far as appears, there is nothing in the by-laws or in the nature of the action proposed which prevents their exercising freely their judgment in this, as in other matters affecting the business. No radical or fundamental change in the object, character or methods of the business of the corporation or of its members is involved. There is no allegation that the directors and managing officers are incapacitated from acting because their interests are adverse to the corporation or its members; or that their action should be interfered with because they are purposing to exercise their powers fraudulently or otherwise in violation of their trust. Nor is it alleged that efforts have been made to control their action by calling a meeting of the 1600 members or that such efforts would be vain, or that there is an emergency requiring interposition of a court of equity. The requirements of Equity Rule 27 are not complied with by alleging simply that plaintiffs requested the Board of Directors "to institute a suit to have said Future Trading Act adjudged unconstitutional" and that the plaintiffs "are informed and

believe that said Board of Directors refused said request because they fear to antagonize the public officials whose duty it is to construe and enforce said Act."

That under such circumstances a stockholder's bill is fatally defective, although it was brought to restrain the enforcement of a statute alleged to be unconstitutional, is well settled; and the rule has been recently applied. *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635; *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455. In the case at bar, plaintiffs' case is still weaker than it was in those cited. For aught that appears most of the members of the exchange, as well as its directors and managing officers, may be of opinion that they will be benefited by the enforcement of the act. Nothing is better settled than that an individual may acquiesce in or waive an admitted infringement of a constitutional right; and I am not aware of any rule of law which requires a corporation, upon request of a minority stockholder, to play the knight-errant and tilt at every statute affecting it, which he believes to be invalid. A corporation, like an individual, may refrain from embarking in litigation to enforce even a clear right of action if litigation is deemed inadvisable; and it is immaterial, in this respect, whether the right of action arises at common law or under a statute or under a constitutional provision. Nor do I know of any reason why the disadvantages which may flow from "antagonizing public officials" may not properly be considered by directors and managing officers of a corporation in determining whether to embark in litigation. The fear of antagonizing customers or other business connections or the public is a motive which quite commonly and properly influences the conduct of men.

If, after the corporation has become a "contract market" its directors and managing officers should seek to subject the plaintiffs, as members, to unauthorized restrictions or should attempt to deprive them of vested rights,

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relief may, of course, be had in a proper proceeding. And likewise if the plaintiffs now have, as individuals, rights entitled to protection, there are appropriate remedies. But this is not such a suit. Here members of a corporation seek to enforce alleged derivative rights; and I doubt whether they have shown that they are in a position to do so.
